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[B-219742]

Appropriations—Availability—Federal Executive Boards

The General Accounting Office agrees with the Veterans Administration's legal analysis that a general Government-wide Appropriation Act fiscal year restriction (currently contained in section 608 of the Treasury, Postal Service, and General Government Appropriation Act for fiscal year 1986, H.R. 3036) on the use of appropriated funds for interagency financing of boards or commissions "which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality," applies to the Federal Executive Boards since the Boards do not have statutory approval for interagency financing. However, single agency financing of the Boards is not prohibited by the restriction.

Matter of: Veterans Administration Funding of Federal Executive Boards, July 1, 1986:

The Administrator of the Veterans Administration (VA) has requested our opinion on the lawfulness of funding Federal Executive Boards (Boards) using interagency fund transfers. Specifically, he asks whether we agree with a VA Acting General Counsel's opinion that section 610 of the Treasury, Postal Service, and General Government Appropriation Act for fiscal year 1985, H.R. 5798 (incorporated by reference into the Continuing Appropriation Act for Fiscal Year 1985, Pub. L. No. 98-473, 98 Stat. 1837 (October 12, 1984)), restricts interagency funding of the Boards. As discussed below, we agree with the VA that interagency funding of the Boards is prohibited by the restriction contained in section 610 of H.R. 5798, *supra.*[1] The Boards do not have "prior and specific statutory approval." On the other hand, we think that financial support of the Boards is lawful as long as only one agency pays the costs involved.

In fiscal year 1984, the VA Medical Center at Dallas, Texas, had been financially supporting the local Federal Executive Boards and had been billing each participating Federal agency its pro-rata share of the cost. The Small Business Administration (SBA) indicated that it would not pay its share, since in its view, interagency financial support was contrary to a GAO interpretation of a similar provision contained in section 608 of the Treasury, Postal Service and General Government Appropriation Act for Fiscal Year 1977, Pub. L. No. 94-363. The VA's legal office concurred with the SBA's position that section 610 of H.R. 5798, *supra,* the successor to section 608 of Pub. L. No. 94-363, prohibits interagency financing of the Boards. In addition, the VA's legal office recommended that the VA discontinue contributing personnel, property and financial support to all Federal Executive Boards. The VA's Administrator asked that we review this opinion.

[1] For fiscal year 1986 the restriction is provided by section 608 of the Treasury, Postal S[illegible], and General Government Appropriation Act for Fiscal Year 1986, H.R. [illegible] incorporated by reference into the Continuing Appropriation Act for Fisc[illegible] 986, Pub. L. No. 99-190, 99 Stat. 1185, 1291 (December 19, 1985)).

BACKGROUND

Federal Executive Boards are interagency coordinating groups created to strengthen Federal management practices, improve intergovernmental relations, and participate, as a unified Federal force, in local civic affairs. The Boards were established by President Kennedy in November 1961. The Boards rely on voluntary participation by members to accomplish their goals. They have no legislative charter and receive no congressional appropriations.

When the Boards were first established, Congress had specifically authorized the use of appropriated funds of member agencies to finance interagency activities. Section 214 of the Independent Offices Appropriation Act, 1946, 31 U.S.C. § 691 (now substantially recodified as 31 U.S.C. § 1346(b)) provided:

> Appropriations of the executive departments and independent establishments of the Government shall be available for the expenses of committees, boards or other interagency groups engaged in authorized activities of common interest to such departments and establishments and composed in whole or in part of representatives thereof who receive no additional compensation by virtue of such membership: *Provided,* That employees of such departments and establishments rendering service for such committees, boards or other groups, other than as representatives, shall receive no additional compensation by virtue of such service.

However, in the late 1960's, Congress was growing concerned that section 214 was being used to divert appropriated funds to interagency programs not specifically authorized by Congress. To remedy this, Congress provided a specific restriction on the authority of section 214 in section 508 of the Department of Agriculture and Related Agencies Appropriation Act, 1969, Pub. L. No. 90-463, 82 Stat. 639 (1968), as follows:

> None of the funds in this Act shall be available to finance interdepartmental boards, commissions, councils, committees, or similar groups under section 214 of the Independent Offices Appropriation Act, 1946 * * * which do not have prior and specific congressional approval of such method of financial support.

A similar restriction, appearing in section 307 of the Independent Offices and Department of Housing and Urban Development Appropriation Act, 1969, Pub. L. No. 90-550, 82 Stat. 937, was enacted October 4, 1968, over the objections of agency spokesmen that this legislation would appear to outlaw the financing of any kind of interagency operation. *See* Senate Hearings on Independent Offices and Department of Housing and Urban Development Appropriation for Fiscal Year 1969, May 22, 1968, at pp., 1143-46, 1408.

In 1971, section 609 of the Treasury, Postal Service, and General Government Appropriation Act, Pub. L. No. 92-49, 85 Stat. 108 (1978), first made the restriction (which had been included in appropriation acts since 1968) applicable to appropriations made in "this *or any other Act.*" [Italic supplied.] This restriction was included in Treasury's Appropriation Acts for each successive year until 1982.

Since 1982, the language of the restriction has appeared in its current form:

> No part of any appropriation contained in this or any other Act, shall be available for interagency financing of boards, commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have prior and specific statutory approval to receive financial support from more than one agency or instrumentality. *Id.,* Continuing Appropriation Act for fiscal year 1986.

DISCUSSION

We have in the past considered the pre-1982 restriction and concluded that it prohibited the availability of executive agency appropriations, otherwise available to interagency entities under 31 U.S.C. § 1346(b), "* * * unless specific congressional authorization has been given for such method of financing." 49 Comp. Gen. 305, 307 (1969); *See also,* B-174571, Jan. 5, 1972.

In 1977, we advised the Office of Management and Budget (OMB) (the agency then charged with the oversight responsibility for Federal Executive Boards) [2] that:

> * * * absent prior and specific congressional approval, the financing of interagency organizations, including FEBs * * *, with funds appropriated to member agencies is contrary to the plain language of section 608 of the Treasury, Postal Service, and General Government Appropriation Act, *supra.* Standardized Federal Regions—Little Effect on Agency Management of Personnel. GAO/FPCD-77-39, August 17, 1977.[3]

According to the Office of Personnel Management (OPM), which now has oversight over the Federal Executive Boards, interagency contributions to Federal Executive Board activities do not violate the restriction because contributing agencies are merely carrying out the purposes of their own appropriations. The Federal Executive Boards, according to OPM, generate no extra expenses by their existence and operation. In support of this view, OPM points out that both under the prior and the current restriction Congress was clearly aware of agency contributions to FEBs and has taken no steps to expressly prevent them from taking place. In taking this position, OPM stands by the views on this subject expressed in a 1977 memorandum from OMB.

The OPM position, which relies in part on the decisions of this Office, does not address the fact that our 1977 report had already rejected this OMB position. In our 1977 report we only noted that the form of congressional approval was in doubt; i.e., whether approval should come from the entire Congress or just from an appropriate committee, and whether the approval should be demonstrated by statute or through some less formal action. The 1982 change in the restriction language appears to have answered this area of uncertainty; that is, it makes it clear that statutory approval is required. We therefore agree with the VA's legal analysis that section 608 of H.R. 3036, *supra,* prohibits interagency financing of Federal Executive Boards. The prohibition will continue as long as the

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[2] This responsibility was transferred to the Office of Personnel Management in June 1982.

[3] We are enclosing a copy of this report with the decision.

restriction is contained, in its current form, in successive appropriation acts.

The new statutory language also contains two other significant changes. It provides that the restriction on funding boards, committees, etc. applies even if such organizations cannot be characterized properly as "interagency entities." Of primary importance, however, is the specific reference in the restriction to entities receiving "financial support from *more than one* agency or instrumentality." [Italic supplied.] This language, appearing for the first time in 1982 and repeated in each annual restriction since that time, indicates plainly that the Congress disapproved of the practice of supporting such entities by "passing the hat," as it were, unless otherwise authorized by statute. While interagency funding is prohibited, however, we see nothing to prevent a single entity with a primary interest in the success of the interagency venture, from picking up the entire costs. In this respect, then, we disagree with the VA legal advice to "immediately discontinue" all VA financial support to FEBs to the extent that it is based on the belief that such financial support would be illegal. Of course, it is certainly not required to bear the full operating costs of the FEBs alone. We only mean that it would be proper if it sought to do so.

[B-222035]

Payments—Quantum Meruit/Valebant Basis—Absence, etc. of Contract—Government Acceptance of Goods/ Services—Benefit to Government Requirement

City of Ansonia may recover $33,187.50 for sewer services provided to the Army's housing facilities at Fort Devens, Massachusetts. The City may be paid on a *quantum meruit* basis, pursuant to the Comptroller General's claims settlement authority, 31 U.S.C. 3702 (1982), because the services constituted a permissible procurement, the Government received and accepted the services after it was notified of the connection, the City acted in good faith and the amount claimed represents no more than the reasonable value of the benefit received.

Statutes of Limitation—Claims—Date of Accrual

City of Ansonia's *quantum meruit* claim is not barred by the 6-year time limitation in 31 U.S.C. 3702(b)(1) (1982). All monetary claims against the United States cognizable by this Office must be received within 6 years of date that claim first accrues or be forever barred. The City's claim first accrued no earlier than March 4, 1981, when the Army accepted sewer services by failing to disconnect its facilities and continuing its use of the City's sewer system with the knowledge that the connection existed and that the City expected payment. Since the City's claim reached this Office on August 26, 1985, the 6-year time limitation in 31 U.S.C. 3702 (1982) was met.

Matter of: City of Ansonia, Connecticut—Sewer Services Claim, July 2, 1986:

By letter dated August 23, 1985, the U.S. Army Finance and Accounting Center forwarded to our Office for settlement the claim of the City of Ansonia, Connecticut (Ansonia) in the amount of $33,187.50. The claim represents sanitary sewer services provided

to family housing facilities at Fort Devens, Massachusetts. Based on our review of the facts in this situation, we conclude that this Office may authorize payment of $33,187.50 to Ansonia on a *quantum meruit* basis for the services provided between March 4, 1981 and June 5, 1984.

BACKGROUND

The record indicates that during 1975 there were discussions between the Army's Director of Facilities Engineering at Fort Devens and Ansonia's contractor in charge of a sewer construction project along the boundaries of Fort Devens. The discussions concerned whether Ansonia would be permitted to enter Fort Devens, as part of the construction project, to connect the Army's housing facilities to the city's new sewer line. The Army agreed to the entry but stated, in a letter dated May 20, 1975, that, in exchange, the connection (including the plugging and abandonment of the Army's existing sewer line at Fort Devens) was to be made at no expense to the Government.

Ansonia subsequently revised its sewer construction plans so that no entry into Fort Devens was required and no connection was to be made by Ansonia between the city's new sewer line and the Army's housing facilities. Ansonia, through its contractor, notified the Army of these revised plans, by letter dated May 30, 1975, stating that the Army would be notified when construction was completed so that it could make its own arrangements for connecting the Fort Devens housing facilities to the city's new sewer line. By letter dated January 28, 1977, Ansonia notified the Army that construction of the sewer line was complete and that connection could now commence. The January 1977 letter also stated that the necessary permits had to be secured from the city prior to making the connection.

No requests for permits were ever made by the Army to connect its housing facilities to the city's sewer system. Nevertheless, at some point in time, the Army's housing facilities at Fort Devens were connected to Ansonia's sewer system. The record does not indicate who made the connection or exactly when it was accomplished. Subsequent dye testing by Ansonia, in 1982, confirmed that the connection had, in fact, been made. Ansonia, apparently, was not aware that this connection had been made until some time in early 1981. On March 4, 1981, Ansonia sent the Army, as a user of the sewer system, a sewer assessment bill for $33,187.50, based on a flat rate per linear frontage foot representing the Army's share of the cost of constructing the city's new sewer line. The letter also stated that a separate user charge, representing operation and maintenance costs, would be established later and billed to the Army. Subsequent to this notification, the Army continued using

Ansonia's sewer system and made no attempt to have its facilities disconnected from the Ansonia system.

On August 10, 1982, the Army refused to pay the sewer assessment on the grounds that it was a tax levied against Federal property from which the Government is constitutionally immune. The Army cited our decisions in 49 Comp. Gen. 72 (1969), B-168287, Feb. 12, 1970 and B-168287, Nov. 9, 1970, as support for its conclusion. The Army indicated, however, that these decisions do permit reimbursement on a *quantum meruit* basis for the reasonable value of services accepted and received by the Government.

As a result of the Army's refusal to pay the sewer assessment, Ansonia requested payment of $44,797.48 on a *quantum meruit* basis, representing its determination of the reasonable value of the services rendered. Ansonia arrived at this figure by preparing and comparing cost estimates for two alternative ways the Army could provide sewer services to the Fort Devens housing facilities. The Army agreed that the $44,797.48, as calculated, represented the reasonable value of the services rendered.

Due to the uncertainty surrounding Ansonia's claim, however, further discussions were held between the Army and Ansonia concerning the amount of the claim. On June 5, 1984, a Memorandum of Understanding was signed by the Fort Deven's contracting officer and representatives of Ansonia, in which the Army agreed to pay and Ansonia agreed to accept $33,187.50 as final payment for sewer services provided to Fort Devens through June 5, 1984. The Memorandum also stated that the sewer connection between the Fort Devens housing facilities and Ansonia's sewer system was made without the knowledge or consent of either Fort Devens or Ansonia. Accompanying the Memorandum was an invoice from Ansonia requesting payment of the $33,187.50 on a *quantum meruit* basis. No other documentation was included with the invoice.

On August 23, 1985, the Army forwarded Ansonia's claim for $33,187.50 to this Office as a doubtful claim, under section 5.1, title 4 of the GAO Policy and Procedures Manual for Guidance of Federal Agencies. The Army recommended that the claim be paid but noted two areas of doubt: (1) Whether Ansonia's claim is time barred under 31 U.S.C. § 3702 (1982), which requires that all claims be received in the General Accounting Office within 6 years after the claim first accrues or be forever barred, and (2) Whether there was any commitment, unauthorized or otherwise, by Government representatives to obtain the sewer services from Ansonia which can now be ratified by authorized contracting officials, thereby providing a basis for payment.

ANALYSIS

Although the record establishes that the Fort Devens housing facilities were connected to Ansonia's sewer system, no evidence is

available to establish when this connection was made and wh made it. In their Memorandum of Understanding, the Army an Ansonia agreed that the sewer connection was made without th knowledge or consent of either the Army or Ansonia. Thus, no in tial commitment, unauthorized or otherwise, was made by Gover ment representatives to obtain the sewer services from Ansonia.

Where a valid written contract for a procurement was never ex cuted and the claimant is unable to establish even an unauthorize commitment by a Government representative to pay for the ser ices provided, the agency may not ratify the procurement retroa tively. 64 Comp. Gen. 727 (1985). However, under this Office claims settlement authority (31 U.S.C. § 3702 (1982)), the Comptro ler General may authorize reimbursement to the claimant on *quantum meruit* basis when certain conditions are met. *Id.*

We must first make a threshold determination that the servic would have been a permissible procurement had the formal proc dures been followed. 64 Comp. Gen. at 728. We have held that ser ice charges, representing operation, maintenance, and constructic costs, made to the Government for the right to use a city's sewa disposal system may properly be paid by the Government. *See* I 158832, May 2, 1966; 42 Comp. Gen. 246 (1962). In addition, we ha stated that formalized utility-type service agreements may proper be entered into by the Government to cover such sewer service *See* 49 Comp. Gen. 72, 77 (1969). Thus, the sewer services at issu here could have been procured by formal agreement between Ans nia and the Army.

Next we must find that the Government received and accept the benefit, the persons seeking payment acted in good faith, a the amount claimed represents the reasonable value of the bene received. 64 Comp. Gen. at 728.

Since, according to the Memorandum of Understanding, the co nection to Ansonia's sewer system was made without the knov edge or consent of the Army, there is no basis, prior to March 1981, to establish that the Army accepted the benefit of the sew connection. However, since the Army chose to continue using An nia's sewer system after March 4, 1981, when it was notified of t connection, we conclude that it accepted the benefit of the sew connection, as well as the sewer services it received after that da Without the connection, the Army would be unable to use t sewer system. Thus, the value of the connection must be includ in the *quantum meruit* payment for services provided since Mar 4, 1981.

Since Ansonia was similarly unaware of the connection un early 1981, it acted in good faith in attempting to bill the Army March 1981 and in continuing to press its claim since then. The fore, this Office may authorize payment of Ansonia's claim for t reasonable value of the sewer connection, and the services provid to the Army since March 4, 1981.

It is difficult to make a precise determination of the benefit the Government receives from a public improvement such as the one involved here. However, in order to prevail on a *quantum meruit* basis, a claimant must show exactly how it arrived at any amounts claimed. An unsupported, blanket statement that a particular sum is the fair and reasonable value of the services rendered will not suffice. No payment may be made until it is clearly shown that the specified and outlined method of computation is based purely upon the value of the particular services rendered to the Government. *See generally* B-168287, Nov. 9, 1970.

Ansonia's claim does appear to set forth, with sufficient clarity, the services actually rendered to the Government. In addition, Ansonia did set forth in detail its method of computing the reasonable value of the services rendered. Ansonia found, and the Army agreed, that this figure was actually $44,797.48. However, due to the uncertainties surrounding the connection, Ansonia reduced its claim to $33,187.50, as payment for the reasonable value of both the sewer connection and use services provided from March 4, 1981 through June 5, 1984. Considering the difficulty of precisely determining the fair and reasonable value of a service such as is involved here, we cannot say that payment of $33,187.50 is unreasonable.

Under 31 U.S.C. § 3702(b)(1), a monetary claim against the United States cognizable by this Office must be received within 6 years of the date that the claim first accrued or be forever barred.[1] Our Office has ruled that a claim first accrues, for the purposes of this Act, when all events have occurred which fix the liability, if any, of the United States and entitles the claimant to sue or file a claim. *See* 42 Comp. Gen. 337, 340 (1963); 29 Comp. Gen. 517, 519 (1950). Ansonia's *quantum meruit* claim first accrued no earlier than March 4, 1981, when the Army accepted the sewer services by failing to disconnect its facilities and continuing its use of the City's system with the knowledge that the connection existed and that the City expected payment. Since Ansonia's claim reached this Office on August 26, 1985, it satisfied the 6-year time limitation in 31 U.S.C. § 3702 (1982). Accordingly, Ansonia's claim is allowed.

[1] Ansonia's claim is subject to the 6-year time limitation imposed by this statute since claims by political subdivisions of states, such as the City of Ansonia, are not included in the law's exception for claims by states. *See* B-199838, Oct. 20, 1981.

[B-221466]

Debt Collections—Waiver—Military Personnel—Pay, etc.—Retired

The widow of a deceased Coast Guard member erroneously received retired pay amounting to $43,281.68 which should have ceased upon the member's death. When the erroneous payments were discovered it appeared the widow was not entitled to a survivor annuity and waiver of the erroneous payment was granted. The service then determined that although the member had elected not to participate in the Survivor Benefit Plan, the service had failed to inform the spouse of that fact an this entitled the widow to receive a full annuity under the Plan. Although the annu ity entitlement is retroactive to the date of the member's death, the widow is nc entitled to additional payment for the period for which she received the erroneou retired pay which was waived. Since the waiver action was based on incomplet facts, it is modified to apply only to the excess she received over the amount due fc the annuity for that period, and the balance is considered as satisfying her annuit entitlement.

Matter of: Maureen S. Fearn, July 3, 1986:

This action is in response to a request for an advance decisio from the United States Coast Guard regarding whether payment c the full amount of a Survivor Benefit Plan annuity should be mad to Maureen S. Fearn, for the same period she received her hus band's retired pay which, due to administrative error, continued t be paid into her bank account after the death of her husband, retired member of the Coast Guard.[1] Collection of the erroneous re tired pay was waived by our Claims Group prior to the determina tion that Mrs. Fearn was eligible to receive Survivor Benefit Pla annuity payments for the same period. It is our view that no add tional amount should be paid to Mrs. Fearn for this period.

Background

Captain William R. Fearn, United States Coast Guard, retired i 1979 and was receiving retired pay when he died on June 4, 198 The Retired Pay Branch of the Coast Guard was notified of h death on June 8, 1981, and again on October 21, 1981, when Mr Fearn submitted a "Claim for Unpaid Compensation of Decease Member of the Uniformed Service." Prior to his death the month checks for his retired pay were being sent to the Connecticut Ban and Trust Company where they were deposited in his and Mr Fearn's joint account. Due to an administrative error no action wa taken to remove Captain Fearn from the retired rolls and despi the fact that at the Bank's suggestion Mrs. Fearn removed Capta Fearn's name from the account, the checks continued to be sent the bank and deposited in the account.

The Coast Guard discovered the erroneous payments in Septer ber 1982 at which time the payments were stopped. During th period from June 1981 through September 1982, Mrs. Fearn thu received payments totalling $43,281.68. She requested waiver of th total amount of erroneous payments stating that she had been to by her husband that she would be receiving survivor benefits ar that she believed in good faith that the amounts she was receivir constituted those benefits. At the time the service notified her the overpayment, it informed her that Captain Fearn had not elec ed participation in the Survivor Benefit Plan, so she was not eli

[1] The request was made by Donald H. Senker, Authorized Certifying Offic United States Coast Guard, Pay and Personnel Center, Topeka, Kansas, and h been assi[illegible]partment of Defense, Military Pay and Allowance Committee cc trol numb[illegible]CG—Control # 1458.

ble for an annuity. The Coast Guard forwarded Mrs. Fearn's request for waiver to this Office with the recommendation that waiver be granted. By action of November 21, 1984, our Claims Group waived collection of the overpayment.

Subsequent to the waiver action, the Coast Guard found that at the time he retired Captain Fearn elected not to participate in the Survivor Benefit Plan, and he did not inform his wife of his election. The Coast Guard also found that it had no record of notifying Mrs. Fearn of Captain Fearn's election not to participate, which was contrary to the provisions of 10 U.S.C. §1448(a)(3) which require the service to notify a member's spouse if the member does not elect coverage for the spouse. Thus, after informing Mrs. Fearn that she had been erroneously receiving retired pay and that she was not entitled to a Survivor Benefit Plan annuity, the Coast Guard determined that Captain Fearn's election not to participate was not valid and that Mrs. Fearn was entitled to receive a full annuity under the Survivor Benefit Plan equal to 55 percent of Captain Fearn's retired pay.[2]

The Coast Guard therefore determined that Mrs. Fearn was entitled to an annuity beginning from the date of Captain Fearn's death and, in August 1985, began current payments. It also determined that her net retroactive annuity entitlement for the period from Captain Fearn's death in June 1981 through July 1985 totaled $79,425.05, which included the period during which she had received the $43,281.68 in erroneous retired pay.

The issue of this case, then, is whether Mrs. Fearn may retain the erroneous retired pay in addition to the Survivor Benefit Plan annuity for the same time period thus allowing her an amount equal to 155 percent of the member's retired pay for that time period, or whether the amount received in retired pay should be set off from the amount Mrs. Fearn will receive under the Survivor Benefit Plan.

Analysis

The statute authorizing our Office to waive claims arising out of "erroneous payments" of retired pay provides discretionary authority to grant such relief in whole or in part under certain conditions, including when collection of the debt would be "against equity and good conscience and not in the best interest of the United States.[3]

Usually, in a case where a spouse receives overpayments due to the service's failure to stop payment of retired pay, the spouse is

[2] This determination apparently was based on court decisions interpreting the provisions of 10 U.S.C. §1448(a)(3) in this manner. See *Barber by and Through Barber* v. *United States*, 676 F.2d 651 (Ct. Cl. 1982), and *Passaro* v. *United States*, 4 Cl. Ct. 395 and 5 Cl. Ct. 754 (1984).

[3] 10 U.S.C. § 2774(a). See also 10 U.S.C. § 1453 concerning waiver of recovery of erroneous Survivor Benefit Plan annuities.

also entitled to retroactive payment of an annuity in a lesser amount for the same period. In such a case ordinarily the waiver would be granted only for the net amount of the debt. See generally 55 Comp. Gen. 113, 117 (1975).

As is indicated above, at the time the waiver action was taken it appeared that Mrs. Fearn was not entitled to a Survivor Benefit Plan Annuity and, instead, that she had received erroneous payments from the Coast Guard totaling $43,281.68. We now know, however, that as a matter of fact she was due a survivor annuity in a lesser amount for the same period for which she received the $43,281.68. Thus, the net debt she owed the Coast Guard at the time the retired pay was stopped at the end of August 1982, was $43,281.68 less the annuity she was due from the Coast Guard for the same period. It was the net amount to which the waiver action should have applied in this case. In keeping with the language and spirit of the waiver statute, which provides discretion to waive in whole or in part debts arising from erroneous payments the collection of which would be against equity and good conscience and not in the best interest of the United States, we therefore modify the waiver action to conform to the facts and to render done that which should have been done.

Accordingly, for the period June 5, 1981, through August 31 1982, Mrs. Fearn is considered to have received the full amount of her entitlement under the Survivor Benefit Plan and is not required to refund the excess she received. That is, she may retain the $43,281.68 she received for that period although further payments for that period should not be made to her. She is also due full annuity payments for the period beginning September 1, 1982 through July 1985, after which her current annuity payments were begun.

[B-221526.3 & .4]

Contracts—Transportation Services—Procurement Procedures

Protest of agency reevaluation of proposals in response to General Accounting Office (GAO) decisions which sustained protests on grounds that three areas of evaluation were improper is denied where agency reevaluation has not been shown to be unreasonable.

Matter of: T.V. Travel, Inc.; World Travel Advisors, Inc., July 3, 1986:

T.V. Travel, Inc., and World Travel Advisors, Inc., protest the re evaluation of proposals by the General Services Administration (GSA) under solicitation No. AT/TC 19791 for civilian agency travel management services for the Atlanta, Georgia, metropolitan area. We deny the protests.

This procurement has been the subject of three previous decisions [illegible]r Office. GSA awarded the contract to a Scheduled Airlines [illegible]et Office (SATO) under this solicitation on February 8

1985. In *T.V. Travel, Inc., et al.,* B-218198 *et al.,* June 25, 1985, 85-1 C.P.D. ¶ 720, we dismissed the protests because we concluded our Office had no jurisdiction over the selection.

We reversed this decision in *T.V. Travel, Inc., et al.—Request for Reconsideration,* B-218198.6 *et al.,* Dec. 10, 1985, 65 Comp. Gen. 109, 85-2 C.P.D. ¶ 640, and sustained the protests of T.V. Travel and World Travel Advisors. The results of GSA's initial evaluation of these proposals were:

T.V. Travel	220.5 points
SATO	218 points
Corporate Travel International	210.75 points
World Travel Advisors	205 points
Universal Travel	203.25 points

Discussions were then conducted and best and final offers submitted. In its initial selection statement, GSA stated that SATO improved its proposal such that its score was higher than T.V. Travel's score. GSA was unable to state SATO's final score, except to indicate that it was higher than T.V. Travel's score, which apparently was unchanged after best and final offers.

We found that the SATO's proposal was not properly evaluated by GSA in three areas, those being: (1) the number of travel agents proposed; (2) reconciliation of agencies' Diners Club accounts and (3) the electronic transmission of summary reports. We recommended that GSA reevaluate the proposals in the competitive range in these three areas and determine which offeror is the highest ranked.

GSA requested reconsideration of the portion of this decision regarding the number of travel agents. GSA did not contest the remainder of this decision. In *T.V. Travel, Inc., et al.—Reconsideration,* B-221526.2, Feb. 18, 1986, 65 Comp. Gen. 323, 86-1 C.P.D. ¶ 171, we affirmed our previous decision.

Before this last decision was issued, GSA had acted upon the recommendation in our December 10 decision. Instead of just reevaluating the three designated areas of the proposals in the competitive range, GSA reevaluated all aspects of the five proposals in the competitive range using the identical rating plan as was used in the initial evaluation. The reevaluation resulted in the following scores:

SATO	207 points
Corporate Travel International	201 points
T.V. Travel	200 points
World Travel Advisors	191 points

Universal Travel	172 points

GSA further notes that, following the initial technical evaluation, site evaluations were conducted for each offeror in the competitive range to verify information in the proposals prior to the SATO selection in early 1985. GSA contends that the contracting officer, following these site evaluations, was more impressed with the SATO than T.V. Travel and World Travel Advisors because of its superior knowledge of federal travel regulations, the competence of its staff and superior qualifications. GSA states that, therefore, it found that the SATO was still the highest evaluated offeror even after the reevaluation so it planned to maintain its contract with the SATO. These protests followed.

GSA contends that the protests should be dismissed because the protesters are no longer interested parties under our Bid Protest Regulations to protest this selection, since their technical scores after reevaluation are lower than the score of Corporate Travel International, the second ranked offeror whose rating has not been protested Corporate Travel International has expressed no interest in this protest.

We will not dismiss the protests on this basis, however, since at least one of the protesters was apparently the highest or second highest rated offeror before GSA completely reevaluated the proposals in response to our decision sustaining the protests and because the protesters contest the reevaluation in its entirety.

The protesters contend that we should not consider GSA's report on the protests because they did not receive a copy of the report within 25 days of filing of the protests. However, our Office did receive the agency report within the 25 days provided in our Bid Protest Regulations, 4 C.F.R. § 21.3(c) (1986). Since the protesters were provided 7 days from the date they received the report to submit their comments, they were not prejudiced by the Navy's failure to provide them with a copy of the report within 25 days. Under the circumstances, we will consider GSA's report in reaching our decision. *Delcor International,* B-221230, Feb. 13, 1986, 86-1 C.P.D. ¶ 160.

The protests concern all aspects of the reevaluation. The standard of our review of an agency's technical proposal evaluation is whether proposals were evaluated reasonably and in accord with the solicitation criteria. *Moorman Travel Service Inc.—Request for Reconsideration,* B-219728.2, Dec. 10, 1985, 85-2 C.P.D. ¶ 643. If so, and if there are no other violations of the procurement statutes and regulations, an award is not legally objectionable. *P-III Associates,* B-213856, B-213856.2, July 31, 1984, 84-2 C.P.D. ¶ 136.

First, the protesters have made a number of allegations related to the propriety of the reevaluation because the copies of the summary score sheets of the reevaluation that they were supplied show that SATO only received 201 points and Corporate Travel International 207 points. GSA reports that this discrepancy was caused by a copying error in preparing the report on the protests. Our review indicates that SATO and Corporate Travel International were in fact awarded 207 and 201 points, respectively.

The protesters contend that the contracting officer was unduly influenced in the reevaluation by her superior's opinion that the SATO should not be replaced. GSA has supplied an affidavit of the contracting officer, who denies that this official has ever talked to her about this selection much less exercised any undue or improper influence. Nothing in the record contradicts the contracting officer's statement.

The protesters also contend that since the SATO will shortly change its joint venture status to a corporate status, it is not eligible to complete the contract. However, this is clearly a matter of contract administration not for consideration by our Office. 4 C.F.R. § 21.3(f)(1) (1986). In this regard, Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 42.12 (1984), provides that novations of contracts for successor contractors are authorized in appropriate circumstances.

The protesters have listed a number of specific areas where they assert the SATO should have been downgraded and they should have received full credit. The allegations concerning the evaluation of SATO's proposal in the areas of the location of the offeror's headquarters and the direct interface of the system elements were considered and denied in a previous decision. Also, in the reevaluation of the criterion concerning the transmission of summary reports electronically, SATO received no points which is consistent with our prior decision.

The protesters contend that the SATO should have lost points for the two subcriteria of the rating plan concerning providing travelers with advance boarding passes. SATO's best and final offer promises this capability by the beginning of the contract. Although the protesters questioned SATO's ability to fulfill its proposal promises, we previously considered and dismissed this protest basis.

In our previous decision, we also concluded that the SATO's proposal should be downgraded because its proposal did not demonstrate a willingness and capability to perform automated reconciliation of accounts for agencies participating in the GSA's Diners Club contract. The solicitation did not acquire this capability, but indicated that additional credit would be given if the offeror had this capability. On the reevaluation, the evaluators gave the SATO three out of five possible points for this subcriterion. GSA states that "during the discussions between the SATO and contracting officer during presentation of best and final offers," this matter was

discussed and the SATO promised to provide these services if re quired.

As GSA states, the SATO was granted partial points for this are because its original proposal stated that a summary report of al sales, "whether processed with a GTR [Government Travel Re quest], GSA credit card [Diners Club] or GTS [Government Trave Service] account," would be electronically generated each montl The proposal statement, together with the SATO's clarifying state ment during discussions that it would provide reconciliation c Diners Club accounts as requested by GSA, convinced GSA that th SATO should be awarded some points for this job. We see n reason to object.

The protester contends that the SATO should have lost points fo the subcriterion "the firm is organized by function; i.e., there ar separate commercial and vacation sections." Since the SATO's pr posal states the unofficial travel services, will be segregated fror official travel, we believe that GSA had a reasonable basis fo giving SATO full credit for the subcriterion.

The protesters also contend that the SATO should not have re ceived credit for the rating plan criteria under which it would re ceive five points if its commercial sales are at least 50 percent c total sales volume or at least equal to the estimated governmer volume and 10 points if its commercial sales represent at least 7 percent of total sales volume or at least four times the estimate government volume. The protesters provided no elaboration on th protest basis. GSA reports that when the capabilities of the majc scheduled air carriers, which are the partners in the SATO joir venture, e.g., Eastern Airlines, United Airlines,[1] are considere the SATO is clearly entitled to full credit for these criteria. As co tended by GSA, each of the separate qualifications of the joint ve ture partners can be reviewed in determining the joint venture qualifications in these circumstances. See *Parker-Kirlin, Joint Ve ture,* B-213667, June 12, 1984, 84-1 C.P.D. ¶621; *DDL Omni Eng neering,* B-220075, B-220075.2, Dec. 18, 1985, 85-2 C.P.D. ¶684. W find that such approach was reasonable and we deny this prote basis.

On the initial evaluation, T.V. Travel received 220.5 points an World Travel Advisors 205 points while on the reevaluation, T.V Travel received 200 points and World Travel Advisors 191 poin out of a possible 224 points. The protesters allege that their propo als were not properly evaluated and that World Travel should hav only been downgraded three points and T.V. Travel 10 points. GS has not communicated to the protesters the specific weaknesses/d ficiencies found in their proposals. Since the reevaluation, whic found additional weaknesses and deficiencies in these proposal

[1] See *T.V. Travel, Inc., et al.—Request for Reconsideration,* 65 Comp. Gen. 3 *supra,* at pgs. 9-10 for description of SATO joint venture arrangement.

was performed in response to our Office's recommendation that certain limited areas of the proposals be reevaluated, the protesters' failure to request a formal debriefing on why their proposals were downgraded on the reevaluation is understandable and excusable. Under the circumstances, we have performed an *in camera* review of the technical evaluation of the protesters' proposals to ascertain whether this reevaluation has a reasonable basis. *Professional Review of Florida Inc.; Florida Peer Review Organization, Inc.*, B-215303.3, B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶394 at 9.

This review reveals that T.V. Travel lost points beyond those it has conceded because it does not propose multiple well-distributed offices in the Atlanta area; it did not indicate that its new staff will be hired at least 3 weeks prior to contract commencement; some of its proposed reservation agents did not have optimum additional relevant experience; its estimated annual volume of government travel represents more than 35 percent of T.V. Travel's total air sales; and T.V. Travel only names five regional cities where it guarantees lower hotel rates than GSA's government rates. World Travel Advisors lost points beyond those that it has conceded because its proposal did not address whether ticket printing or pulling is done by staff other than reservation agents; it does not sufficiently address customer "feedback" and the use of questionnaires in quality control; it did not demonstrate the use of programming superior in flexibility to standard "back office" software packages; its proposed manager does not have optimum supervisory and project management experience; it did not list all the reservation agents needed to perform the work; its quality control manager has no additional special qualifications; its estimated annual volume of government air travel is not less than 30 percent of its air sales; it did not provide verifiable guaranteed hotel rates that are lower than GSA's discounted rates; and it did provide adequate verifiable car rates lower than GSA's rates. Based on our review, we conclude that GSA had a reasonable basis to downgrade T.V. Travel's and World Travel Advisors' proposals on the reevaluation.

Finally, GSA continues to disagree with our prior decisions regarding the evaluation of the number of travel agents in the SATO proposal. We held that the SATO should not have received the maximum score for these subcriteria because it proposed fewer travel agents than the optimum staffing preference indicated in the solicitation evaluation criteria and the rating plan. However, since this rating plan criteria is worth only four points, even if the SATO received no credit, it would still receive the high score. Therefore, we need not consider GSA's reevaluation in this area.

Accordingly, the protests are denied.

[B-219644.4]

Contracts—Negotiation—Offers or Proposals—Discussion With All Offerors Requirement—"Meaningful" Discussion

Determination by agency personnel conducting the evaluation of proposals that protester had submitted an alternate proposal supports conclusion that protester's proposal, as viewed in its entirety and as reasonably interpreted, included offer of alternate system. Since the contracting officer did not make award on the basis of initial proposals and the alternate proposal was within the competitive range, the requirement for meaningful discussions extended to the alternate proposal.

Matter of: Department of the Army—Request for Reconsideration, July 7, 1986:

The Department of the Army requests reconsideration of our decision in *San/Bar Corporation*, B-219644.3, Feb. 21, 1986, 86-1 C.P.D. ¶183. In that decision, we sustained in part the protest of the San/Bar Corporation (San/Bar) against the award of a contract to a consortium of Siemens A.G./AT&T Technology Group (Siemens/AT&T) under request for proposals No. DAJA37-84-R-0430 issued by the Army for the supply and installation of key telephone systems in the Federal Republic of Germany. We affirm our prior decision.

The Prior Decision

In August 1984, the Army solicited offers for meeting the Army's requirements over a base year and 2 option years for the supply and installation of standard key telephone systems (block "A" items), electronic key telephone systems (block "B" items), line trunk conditioning equipment (block "C" items) and inside cable distribution systems (block "D" items) in Germany. The solicitation provided that award would be made by block to the responsible offeror submitting the low, technically acceptable offer for each block.

With regard to block "B" for electronic key telephone systems, San/Bar, in addition to offering the ITT Telecom Products Corporation (ITT) 3100 electronic key telephone system which was the subject of San/Bar's block "B" protest, also offered the AT&T Horizon 32A system and two other systems. Siemens/AT&T offered AT&T Horizon and three other systems under block "B," while a consortium of ITT/Standard Electrik Lorenz (ITT/SEL) offered ITT's 3100 system.

While contracting officials, based upon the evaluation of the initial proposals, included the ITT 3100 system among the electronic key telephone systems which, overall, were technically acceptable, it is apparent that they did so only with reservations. Among the problems which they identified was the extent to which the ITT 3100 system met the requirement of specification 2.19 that the required touch-tone-type telephones be able to receive and transm

both rotary (dial) and touch-tone signaling from central district offices.

San/Bar stated in its initial proposal that if the central office is rotary, then it would be necessary to "provide commercially available Tel-Touch to Pulse Converters" between the touch-tone telephones and the central office. The Army's technical evaluation of the ITT 3100 system indicated that the system would accept either touch-tone or rotary signals, but not both at the same time without the provision of additional equipment.

Although the Army informed ITT/SEL in questions submitted to that firm in March 1985 of the Army's concern as to whether the ITT 3100 system satisfied specification 2.19, neither in the questions directed to San/Bar in March 1985 nor in the subsequent two rounds of best and final offers (BAFO's) did the Army inform San/Bar that its offer of the ITT 3100 system was technically deficient in regard to specification 2.19 or otherwise.

In their evaluation of the initial BAFO submitted by San/Bar, contracting officials described San/Bar's offer of the ITT 3100 system as "questionable." In particular, they noted that:

> [T]he BOM [bill of material] submitted for these optional equipments do not include the DTMF trunk converters i.e., refer to ITT/SEL answer to question 3g, Block B, concerning Salient Feature, 2.19. San/Bar can be considered technically non-responsive with the alternate offer of system 3100, because the BOM is not complete, or you can add the additional costs for DTMF trunk converters to their price quotation equivalent to the price increases submitted by ITT/SEL in their "Best & Final." Whatever choice is adopted, San/Bar is still technically acceptable in Block B with their Horizon submission.

The contracting officer determined that Siemens/AT&T's second BAFO for block "B" offered an evaluated cost to the government of $18,117,480.64 for the base and 2 option years. He found that ITT/SEL's proposal for block "B," offering the ITT 3100 electronic key telephone system, offered an evaluated cost of $18,325,105.55. Although the Army's preliminary calculations indicated that the ITT 3100 system proposed by San/Bar would cost approximately only $15.95 million, the contracting officer instead evaluated San/Bar's proposal based upon the $22,115,403.16 evaluated cost of its proposed Horizon system. As explained in the agency memorandum of July 23, San-Bar's alternate proposal—for the ITT 3100 system—was "deemed technically nonresponsive, because the BOM [bill of material] as submitted was substantially incomplete." In particular, the memorandum referred to the agency's previously quoted evaluation of San/Bar's initial BAFO wherein the bill of material was faulted for not including the touch-tone trunk converters necessary to meet specification 2.19. Award was made to Siemens/AT&T as the low, technically acceptable offeror for block "B."

In its subsequent protest to our Office, San/Bar questioned the award for block "B," denying that the ITT 3100 electronic key telephone system which it offered was technically deficient and arguing that, in any case, the Army's failure to mention the purported deficiency during discussions rendered the discussions inadequate.

We concluded in our decision that there was no reason to question the reasonableness of the Army's conclusion that the ITT 3100 system which San/Bar offered to supply at the proposal price did not satisfy all of the specification requirements. We agreed, however, with San/Bar that its failure to offer the additional equipment required to meet the specifications was not such a deficiency as would justify the elimination of San/Bar's offer of the ITT 3100 system from the competitive range without discussions. In particular, we noted that the agency undertook discussions—including at least one question directed at compliance with specification 2.19—with ITT/SEL in regards to its proposed ITT 3100 system even though the technical evaluation of the system indicated that additional clarification, modification or equipment would be required to satisfy the Army's concerns as to compliance with a number of the solicitation specifications, including specification 2.19. Moreover, the Army's evaluation of San/Bar's initial BAFO, as previously quoted, suggested that the agency's concerns regarding specification 2.19 were readily susceptible of alleviation by the simple addition of touch-tone trunk converters, as apparently offered by ITT/SEL and mentioned by San/Bar. See *Phoenix Safety Associates, Ltd.*, B-216504, Dec. 4, 1984, 84-2 C.P.D. ¶ 621 (where the contracting officer does not make award on the basis of the initial proposals, he should conduct meaningful written or oral discussions with all responsible offerors who submit proposals within the competitive range); cf. *Ultra Publicaciones, S.A.*, B-200676, Mar. 11, 1981 81-1 C.P.D. ¶ 190; (requirement for meaningful discussions extends to alternate, acceptable proposals within the competitive range) *Minority Media Syndicate Inc.; North American Precis Syndicate, Inc.*, B-200823, B-200823.2, Feb. 12, 1981, 81-1 C.P.D. ¶ 96. Accordingly, we sustained the protest with regard to block "B" on the ground that the Army's failure to conduct meaningful discussions with San/Bar concerning its proposed ITT 3100 system deprived the protester of the opportunity accorded ITT/SEL of revising its proposal for the ITT 3100 system and, thus, deprived the protester of the opportunity for award.

Existence of an Alternate Proposal

In our prior decision, we recognized that the Army maintained that San/Bar did not offer the ITT 3100 system with its initial proposal, but instead only offered it with its first BAFO. Although the Army acknowledged that San/Bar provided technical literature and price quotes for the ITT 3100 system with its initial proposal, it pointed out that San/Bar had stated that:

> For the purpose of simplifying the process of issuing Delivery Orders against Basic Contract, San/Bar Corporation has prepared an optional proposal for review and consideration . . . . This proposal is submitted only as an option for the review

ing authorities and is in no way affiliated with the original solicitation to which San/Bar Corporation has responded.

We rejected the Army's contention, however, holding that:

The record considered as a whole, however, indicates not only that San/Bar indeed offered the ITT 3100 system in its initial proposal, but also that contracting officials recognized this fact. In its initial technical proposal, San/Bar clearly stated that:

"The minimum salient technical capabilities for the Electronic Key Telephone System (EKTS) requirements are satisfied through the implementation of the systems listed below.

"San/Bar Corporation—VISION 2000

ATT Technologies—HORIZON 32A

ITT—3100L

Ericsson—PRODIGY"

San/Bar next described each of the four telephone systems—including the ITT 3100 system—and then discussed how each specification would be met by the systems. Moreover, we note that the Army's own evaluation of initial proposals stated that San/Bar had proposed the ITT 3100 system as an "ALTERNATE" proposal under block "B."

In its request for reconsideration, the Army states that our decision and recommended remedy "all depend on your finding that the Army's 'contracting officials' recognized the existence of San/Bar's alternate proposal of the ITT 3100 system." The Army, however, maintains that the Army personnel who evaluated San/Bar's proposal and found that San/Bar had offered the ITT 3100 system as an alternate lacked the authority to ascertain the existence of an alternate proposal. The Army contends that the contracting officer, which it describes as the only contracting official "empowered to decide what constitutes a proposal," has consistently viewed San/Bar's proposal as not including the ITT 3100 system. Moreover, the Army renews its argument that San/Bar's initial proposal in fact did not include the ITT 3100 system. In support of this argument, it cites the quotation previously relied upon by the Army in this regard and also claims that San/Bar "did not list the ITT 3100 on its BOM [bill of material]" submitted to the agency. Further, the Army questions our use of the phrase "[t]he record considered as a whole," contending that only the actual proposal can be considered in determining what an offeror has proposed.

The fundamental question which we considered in our prior decision, however, was not whether the Army was bound by the conclusions of the Army personnel conducting the technical evaluation of San-Bar's proposal. Rather, the question was whether San/Bar's proposal, *as reasonably interpreted,* offered the ITT 3100 system as an alternate for consideration for award, cf. *Arthur D. Little, Inc.,* B-213686, Aug. 3, 1984, 84-2 C.P.D. ¶ 149, and, if so, whether the offer was within the competitive range (thereby giving rise to an obligation to conduct meaningful discussions concerning the system).

While a portion of San/Bar's initial proposal, when viewed by itself, could be interpreted as offering the ITT 3100 system only as

an option for future consideration, we concluded that the only re sonable interpretation of San/Bar's overall proposal was that tl firm was offering the ITT 3100 system as an alternate for conside ation for initial award. In the context of the entire proposal, tl reference to an "optional proposal" could best be understood meaning an alternate proposal. At a minimum, the contracting ficer should have requested clarification from San/Bar during tl ensuing discussions.

We see nothing in the Army's latest submission to change o conclusion that San/Bar was offering the ITT 3100 system as an a ternate for consideration for award. As previously indicated, Sa Bar provided technical literature and price quotations for the IT 3100 system; it stated that the block "B" technical requiremen for the electronic key telephone systems were satisfied throu "implementation" of the ITT 3100 system, as well as through t Horizon and other systems; and the firm described the offered sy tems—including the ITT 3100 system—and how they would me the specifications.

Moreover, the Army's position overlooks the fact that San/B submitted bills of material—including prices—for the ITT 31 system with both its first and second BAFO's. This was recogniz in the Army's evaluation of San/Bar's first BAFO, wherein it w noted that the "BOM [bill of material] for these optional equi ments" did not include the trunk converters needed to meet the quirements of specification 2.19. The Army does not explain w San/Bar offered prices for the ITT 3100 system if it was not offe ing to supply the system.

Prior Recommendation

In our prior decision, we recommended that the Army refra from exercising its options under the contract with Siemens/AT& as they relate to the 2 option years for block "B." In addition, found San/Bar to be entitled to recover the costs of filing and pu suing its protest at GAO and of proposal preparation.

San/Bar requests that we clarify our recommendations. In pa ticular, it notes that the goods and services under the contract a to be provided pursuant to delivery orders. It indicates that views us as recommending "that the option to issue further orde under Block 'B' not be exercised until the requirements of th block are recompeted."

We disagree. San/Bar's proposed interpretation would preve the Army from acquiring electronic key telephone systems need during the base year but not yet ordered. Accordingly, our reco mendation instead was that the Army refrain from exercising t op or block "B" and from issuing delivery orders in the opti ye making this recommendation, we assumed that the del er issued during the base year will not significantly exce

the Army's estimated requirements as set forth in the solicitation in the absence of urgent and compelling circumstances requiring additional orders.

We decline to change our recommendation.

Our prior decision is affirmed.

[B-221675]

Transportation—Automobiles—Authority

An employee, transferred from Pullman, Washington, to Fairbanks, Alaska, was authorized to ship a privately owned vehicle (POV). The agency disallowed the POV claim based on the rationale that the employee and her family used another POV as their approved mode of relocation travel, and thus exhausted their rights under 5 U.S.C. 5727, which precludes the shipment of more than one POV. On appeal, the claim is allowed. Relocation travel and POV shipment entitlements are separate and distinct statutory rights. The use of a POV as an approved mode of travel, in lieu of other approved modes of travel, is reimbursable on a mileage basis under authority of 5 U.S.C. 5724, and such use as a mode of personal transportation does not diminish the employee's rights under 5 U.S.C. 5727 to ship a different POV when travel orders approve such shipment. *David J. Dossett,* B-217691, July 31, 1985.

Officers and Employees—Transfers—Temporary Quarters—Subsistence Expenses—Computation of Allowable Amount

A transferred employee reclaims amount of disallowed portion of meals and miscellaneous expenses incurred while occupying temporary quarters. The agency denied the claim based on its own internal guidelines which provide that such expenses up to 49 percent of the daily allowable maximum rate of per diem are deemed reasonable, but any amount in excess of that percentage was to be summarily disallowed regardless of unusual circumstances. Further agency consideration of the claim is required, since all evaluations of reasonableness must be made based on the facts in each case. While an agency may establish as a guideline that a percentage of such daily maximum is reasonable on a "less than" basis, the use of that guideline to summarily bar reimbursement of any amount in excess of that percentage without permitting the employee to supply evidence of its reasonableness is arbitrary and not consistent with the Federal Travel Regulations and decisions of this Office. The claim may be allowed if evidence of unusual circumstances is presented.

Matter of: Debra R. Hammon—Relocation Expense Entitlements, July 7, 1986:

This decision is in response to a request from the Office of the Regional Director, Region X, Department of Health and Human Services. It concerns the entitlement of an employee of the Social Security Administration to be reimbursed certain travel and relocation expenses incident to a permanent change-of-station transfer in 1984. We conclude that the employee is entitled to additional reimbursement for the following reasons.

BACKGROUND

The employee, Mrs. Debra R. Hammond, was transferred from Pullman, Washington, to Fairbanks, Alaska, by travel orders issued July 5, 1984. Those orders authorized travel, transportation and travel per diem for her and her family (husband and 1 dependent child); transportation of their household goods, including temporary storage; shipment of a privately owned vehicle (POV); te porary quarters subsistence expense (TQSE), not to exceed 60 da real estate transaction expenses and miscellaneous expense re bursement. It was further provided that Mrs. Hammond and child would travel by air and her husband would travel to her n duty station by POV.

The agency amended the travel orders on the same date, and proved a change in the mode of travel to permit the employee a her child to accompany the employee's husband by POV. record shows that the employee shipped one POV and used anot POV as her mode of relocation travel. Following completion of transfer and submission of her travel vouchers, Mrs. Hammor TQSE claim as well as the expenses claimed for travel, in combi tion with the cost of POV shipment, were questioned.

By Voucher Adjustment Notice dated July 2, 1985, Mrs. H mond's official travel mileage was recalculated and reduced; re bursement for the POV shipment costs was suspended due to l of a verifiable receipt; the laundry and dry cleaning charges w suspended due to lack of 2 receipts; and her TQSE claim was duced.

Following reclaim, Mrs. Hammond's TQSE claim for additic amounts was again denied, and her laundry and dry cleaning pense claim was partially allowed. While the POV shipment cl had initially only been suspended due to lack of a receipt, it disallowed in its entirety on reclaim. The basis for that disall ance was the assertion that since Mrs. Hammond and her fa had used a POV as their mode of relocation travel, such POV was viewed as having exhausted her statutory entitlement und U.S.C. § 5727 (1982) to transport a POV to an overseas duty sta incident to relocation.

Mrs. Hammond has appealed the POV shipment and TQSE terminations. She asserts that her TQSE entitlement was initi incorrectly computed since the family lodging cost was not inclu in the reimbursement calculation. Additionally, she claims that POV shipment cost should be allowed since she only shipped vehicle.

DECISION

Transportation of a POV

We do not agree with the agency determination of nonent ment as to this item.

The entitlement to ship a POV at government expense and employee's entitlement to be reimbursed for relocation travel separate and distinct statutory rights. The law and regulations erning reimbursement for employee relocation expenses are tained in 5 U.S.C. §§ 5724 and 5724a (1982), and Part 2 of Cha 2, Federal Travel Regulations, FPMR 101-7 (FTR), *incorp. by*

41 C.F.R. § 101-7.003 (1985). Among the expenses authorized therein is the cost of personal travel of an employee and his immediate family to the new duty station.

Paragraph 2-2.3 of the FTR provides that the use of a POV in connection with a permanent change-of-station transfer may be authorized, with the authorized use of one or more POV's to be in lieu of other approved modes of personal transportation. We stated in decision *Gary E. Pike,* B-209727, July 12, 1983, at 5:

> The trust of these provisions is to permit the employee and the members of his immediate family to travel at government expense from his old to his new duty station by such means as is authorized by the employing agency, with such allowable costs not to exceed the costs of travel by the usually traveled route from old station to new station by the mode of travel authorized.

While none of the above-cited provision discusses the shipment of a motor vehicle, 5 U.S.C. § 5727 (1982) authorizes employees who are transferred to and from posts of duty outside the continental United States to ship one POV in addition to and independent of the expense of personal travel of the employee and his immediate family. In the present situation, the travel orders issued to Mrs. Hammond specifically authorized the shipment of a POV. Additionally, they provided that while she and her child would use commercial air transportation, her husband would use a POV as his mode of travel. Those orders went on to state as a limitation on the expense reimbursement associated with these two entitlements:

> * * * Total cost not to exceed that of mileage for one POV from Lewiston to Seattle, cost of GBL shipment of auto from Seattle to Fairbanks, airfare for employee & dependents from Seattle to Fairbanks & per diem for employee & dependents for travel time from Lewiston to Fairbanks *as if traveled as above.* [Italic supplied.]

As noted, the travel orders were amended to authorize a change in the employee's and dependent child's mode of travel, to wit: "they will now travel via POV with spouse." The above statement regarding the limitation on travel cost reimbursement was restated. In addition, the travel order was amended to increase the total cost of the relocation move due to an increase in the estimated cost of shipping a POV.

In decision *David J. Dossett,* B-217691, July 31, 1985; also involving a transfer between Alaska and the continental United States, we said at 3:

> Although the use of a second POV as an authorized mode of personal transportation effectively resulted in the transportation of that vehicle as though it was an otherwise properly transportable item * * * [s]o long as its use for personal travel purposes is approved in lieu of other modes of travel and transportation, and so used, reimbursement for a second POV is authorized on a mileage basis at the rates prescribed in FTR, para. 2-2.3b.

See also *Gary E. Pike,* above.

It is our view that under these travel orders Mrs. Hammond was entitled to ship a POV and use another POV as her personal mode of transportation. Therefore, she may be reimbursed the cost of having a private contractor transport her first POV to Fairbanks,

not to exceed the estimated shipping cost of $1,416 specified in th travel orders.

Temporary Quarters Subsistence Expense

According to the itemized expense record prepared by Mrs. Ham mond to accompany her initial travel voucher, her TQSE claim fo 60 days totaled $10,208.05. Of that amount, $3,626.80 represente the cost incurred for her and her family's lodging and $6,581.2 represented the cost of subsistence and miscellaneous expense: The agency's audit of the voucher determined that the lodging portion of the cost was reasonable, and no adjustment was re quired. However, a significant adjustment was made for the sul sistence and miscellaneous expense portion claimed. We do nc agree that the basis for reduced entitlement is supported by go erning law and regulation.

The submission states that the maximum calculated per diem au thorized Mrs. Hammond and her immediate family for TQSE pu poses in the Fairbanks, Alaska area was $216.66 a day, subject t reduction with passage of time, on an incremental basis. FTI para. 2-5.4. The submission goes on to state that the policy an practice of the agency is that "reimbursement for meals and mi cellaneous expenses ordinarily should not exceed 49 percent of th maximum per diem for the locality." Even though the 49 percer factor was recognized as a guideline, the submission goes on t state that the agency computed the maximum daily amount pa able for meals and miscellaneous expenses based strictly on the 4 percent factor, thus permitting reimbursement in the amount $106.16 a day for the first 30 days, and for the second 30 day $79.62 a day.

We inquired as to the basis upon which the agency establishe that 51 percent of the maximum per diem must be reserved fc lodging costs, and only 49 percent is available for meals and misce laneous expenses. We were informed that the Regional Supplemer to chapter 5-30 of the Department of Health and Human Servic Travel Manual, relating to reasonableness of meals and miscellan ous claims while on actual and necessary subsistence travel, pr vides, in part, in section X5-30-20:

> A. * * * that the daily cost of meals and miscellaneous expenses will be cons ered reasonable if they do not exceed 45% of the proscribed daily maximum. Clair in which the cost for meals and miscellaneous exceeds 45% may be allowed prov ing that the necessity for the additional cost is adequately justified. In no case, ho ever, shall meals and miscellaneous costs in excess of 49% be allowed.

It is also stated in that supplement that such policy is based on decision by this Office, without specification, which ruled that tl lodging portion of a daily subsistence rate *must* constitute the m jority of the expense. We are not aware of any decision by th Office in which we ruled that the lodging portion of a travel e pense claim, or a temporary quarters subsistence expense clai m[illegible] constitute the majority of the expense claimed, or that tl

cost of the actual subsistence and miscellaneous expense portion of such a claim may never exceed 49 percent, or any other specific percentage.

Under 5 U.S.C. § 5724a(a)(3), as amended, and implementing regulations contained in Chapter 2, Part 5 of the FTR's, as amended in part by GSA Bulletin FPMR A-40 (Supp. 10, Nov. 14, 1983), a transferred employee may be reimbursed subsistence expenses for himself and his immediate family, generally, for a period of up to 60 days while occupying temporary quarters. These regulations authorize reimbursement only for the actual subsistence expenses incurred, provided they are incident to the occupancy of temporary quarters and are reasonable as to amount. FTR para. 2-5.4a. It is the responsibility of the employing agency, in the first instance, to review the employee's claim in terms of amount spent daily for needs (FTR para. 2-5.4b), to determine whether the subsistence expense claim is reasonable. In decision 52 Comp. Gen. 78 (1972), we held that such evaluation of reasonableness must be made on the basis of the facts in each case. In *Jesse A. Burks,* 55 Comp. Gen. 1107 (1976), affirmed and amplified on reconsideration, 56 Comp. Gen. 604 (1977), we held that where the agency has exercised that responsibility, this Office generally will not substitute its judgment for that of the agency, in the absence of evidence that the agency's determination was clearly erroneous, arbitrary, or capricious.

In decision *Harvey P. Wiley,* B-218988, March 12, 1986, 65 Comp. Gen. 409, citing to decision *Harry G. Bayne,* 61 Comp. Gen. 13 (1981), we approved as a reasonable exercise of agency discretion the establishment of a guideline alerting employees that a certain percentage (in that case 45 percent) of the statutory maximum rate of per diem for TQSE, meals and miscellaneous expenses may be considered as reasonable. We went on to state, however, that such a guideline could not operate as an absolute bar to payment of additional amounts in any case where the employee could justify the expenditure on the basis of unusual circumstances, with the burden of proof being on the employee to establish that the meals and miscellaneous expenses incurred in excess of the stated percentage were reasonable.

In the present case, the agency guideline of 49 percent was applied to Mrs. Hammond's claim as an absolute bar, without consideration of the possibility that any of the claimed expenses in excess of that amount may have been reasonable. Nor was she given the opportunity to supply evidence which might demonstrate that any part of the subsistence expenses claimed, which were in excess of 49 percent, were reasonable. In view of the fact that an initial high maximum per diem rate of $216.66 was established for the Fairbanks, Alaska, locality for the employee, her spouse, and her dependent, it is not unrealistic to suppose that over a long period (60 days), subsistence expenses in excess of 50 percent of maximum per diem might prove to be reasonable.

As indicated above, an agency regulation that absolutely limit certain types of otherwise reimbursable expenses, such as meal and miscellaneous, to a percentage of the approved per diem rate i arbitrary and not consistent with the FTR's and the decisions c this Office. Therefore, the agency's policy should be revised to re flect the fact that while payment will normally be limited to 4 percent of the statutory maximum, amounts in excess of tha figure may be paid if adequate justification based on unusual ci cumstances is submitted by the employee.

Accordingly, Mrs. Hammond is entitled to present evidence fc agency consideration that the subsistence expenses incurred whic were in excess of 49 percent of the maximum locality per diem fo Fairbanks, Alaska, are reasonable because of unusual circun stances. If such evidence is presented and accepted by the agenc the claim may be paid to the extent authorized by FTR para. 2-5. as amended.

[B-222317]

Contracts—Negotiation—Offers or Proposals—Best and Final—Additional Rounds—Auction Technique Not Indicated

Agency issued a stop-work order and reopened negotiations for a second round best and final offers where, shortly after award, agency discovered that it had inco rectly advised one offeror that its alternate initial proposal was technically una ceptable, thereby precluding a best and final offer submission, when, in fact, t proposal had been found technically acceptable.

Contracts—Negotiation—Prices—Disclosure

Where awardee's best and final offer price has been disclosed, to eliminate unfa advantage under recompetition, agency may require other offerors to agree to sin lar disclosure.

Contracts—Negotiation—Awards—Erroneous

Disclosure of offerors' proposal information required by agency to permit recompe tion of improperly awarded contract must be substantially similar, but need not identical.

Matter of: Sperry Corporation, July 9, 1986:

Sperry Corporation (Sperry) protests the reopening of negoti tions under request for proposals (RFP) No. 00244-85-R-01 issued by the Naval Supply Center, San Diego (Navy). The RFP for an automated data system to support the civilian personn function on all Navy management levels.

The Navy awarded the contract to Sperry on January 13, 198 based on best and final offers which had been received on Janua 3. However, the Navy discovered that it had incorrectly advised a other offeror, System Development Corporation (SDC), that its a ternate initial proposal was technically unacceptable. Accordingl the Navy determined that the award was improper, issued a sto work order to Sperry, and invited a second round of best and fin offers from all offerors.

Sperry asserts that the award was not improper and that the Navy's action has created a prohibited auction. Sperry requests that the stop-work order be rescinded and that performance commence under the initial award.

We deny the protest as we find that the Navy took appropriate action to remedy an improper award.

In response to the RFP, four companies submitted initial proposals, three of which, including SDC, also submitted alternate proposals. The SDC alternate proposal included, among other items, model CI-300 and model CI-600TC Itoh Company, Inc., line printers. The Navy technical evaluator found that both SDC proposals were technically acceptable. The Sperry proposal, which offered the same line printers, was found technically acceptable. The offerors were notified by letter dated November 27, 1985, to submit best and final offers. However, due to an administrative error, the letter sent to SDC incorrectly advised SDC that its alternate proposal was not acceptable.

In preparation for SDC's requested debriefing, the error was discovered. The Navy determined that since award has been made to Sperry for the same equipment proposed by SDC, which the Navy had erroneously advised SDC was technically unacceptable, a second round of best and final offers was necessary. Since award had been made only 1 week previously, and performance had barely commenced, the Navy issued a stop-work order pending the outcome of the recompetition. In addition, because Sperry's total contract price and total option prices had been disclosed, each other offeror agreed to disclosure of its total prices. Requests for a second round of best and final offers were mailed on March 4 with an April 7 closing date.

Sperry takes the position that while SDC may have been prejudiced by the Navy's erroneous notification, it was incumbent on SDC to pursue the matter at the time of the erroneous notice, and that the award to Sperry was not improper because there was no showing that, absent the error, SDC would have been awarded a contract. Accordingly, Sperry argues that the appropriate remedy is to award proposal preparation costs to SDC and allow the Sperry award to stand.

SDC states that upon being advised of the unacceptability of its alternate proposal, it contacted the Navy to request the basis for this determination, but was advised that this information could not be provided until a debriefing. The Navy concurs in this sequence of events and has provided a copy of a file memorandum dated December 2, 1985, summarizing the content of a telephone conversation between the Navy contract negotiator and the SDC contract manager. This memo indicates that in response to SDC's inquiry as to why its alternate proposal was found unacceptable, the Navy advised that this information was properly the subject of the

postaward debriefing. Thus, Sperry's allegation that SDC failed to pursue the matter is factually incorrect.

The Navy, citing *United States Testing Co., Inc.,* B-205450, June 18, 1982, 82-1 C.P.D. ¶ 604, argues that since the award to Sperry was clearly improper, and the impropriety was ascertained almost immediately after award, the deficiency was one which it was required to correct. The Navy states that the action it took is in accord with our Office's decisions such as *Honeywell Information Systems, Inc.,* 56 Comp. Gen. 505 (1977), 77-1 C.P.D. ¶ 256 and *Woodward Assocs., Inc.; Monterey Technology, Inc.,* B-216714, B-216714.2, Mar. 5, 1985, 85-1 C.P.D. ¶ 274. In these decisions, we held that where an improper award has been made, termination and recompetition of a negotiated contract is appropriate even where there has been price disclosure regarding the awardee's offer. These cases also permit the agency to require exposure of all prices when it is necessary, as here, to take proper corrective action. Such disclosure was required by the Navy in this case, and was agreed to by the offerors.

Sperry contends that since this approach creates a prohibited auction, it is limited to situations in which award has been made to a technically unacceptable or not the lowest-priced offeror, and it is clear that the contract should otherwise have been awarded to the protester. Sperry cites *Delta Data Systems Corporation* v. *Webster,* 744 F.2d 197, 205 (D.C. Cir. 1984), for the proposition that an essential requirement of overturning any award is a clear showing that but for the government noncompliance with regulations the protester would have received the award. However, the Delta Data case deals with the propriety of a *court* ordering an award to a protester under the original solicitation. It does not address either the fact situation or remedy at issue here, which concerns corrective action taken by the procuring agency.

In our prior cases, we have considered the appropriateness of taking remedial action in terms of our traditional consideration of a number of factors, including the seriousness of the procurement deficiency, the degree of prejudice to other offerors or the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact on the user agency's mission. In our view, where, as here, an offeror was prevented from competing because of agency action on the basis of the equipment which was substantially the same as the equipment for which award was made, this deficiency is sufficiently serious and prejudicial to warrant the remedial action taken by the Navy.

Sperry asserts that the auction techniques invoked here are prohibited except for very exceptional situations. While the Federal Acquisition Regulation, 48 C.F.R. § 15.610(d)(3) (1984), does proscribe the use of auction techniques, we interpret this to apply to the negotiation tactic of indicating one offeror's price to another offeror

during negotiations. We have held that where reopening of negotiations is properly required, notwithstanding the disclosure of an offeror's proposal, this does not constitute either improper technical leveling or an improper auction. *Youth Development Assocs.*, B-216801, Feb. 1, 1985, 85-1 C.P.D. ¶ 126.

In addition, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. Rather, the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction. *Honeywell Information Systems, Inc.*, 56 Comp. Gen. at 512, *supra; Harris Corp.*, B-204827, Mar. 23, 1982, 82-1 C.P.D. ¶ 274. The statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques. *PRC Information Sciences Co.*, 56 Comp. Gen. 768, 783 (1977), 77-2 C.P.D. ¶ 11. Moreover, the Navy here made a particular effort to equalize the competition by requiring price disclosure by all offerors.

Sperry also argues that the approach taken here is unfair because the information disclosed about its offer was greater than the information about the SDC offer. Sperry points out that while its best and final offer pricing was disclosed, there is no such disclosure provided for SDC's best and final offer on its alternate proposal. *Honeywell Information Systems, Inc.*, 56 Comp. Gen. 505, *supra,* requires the disclosure of substantially comparable information, not of identical information. There was no best and final offer price for SDC's alternate proposal that could be disclosed because SDC did not submit a best and final offer on its alternate proposal when it was advised by the Navy that the proposal was technically unacceptable. The Navy, however, did disclose SDC's initial offer prices for its alternate proposal. Under the circumstances, the Navy has made a substantially comparable disclosure; it can not be expected to disclose information that does not exist.

Sperry's final argument regarding the inequity of the remedy concerns the possibility that information regarding the configuration of its system may have become available to SDC, while Sperry was not provided with similar information regarding SDC's proposal. This is based on the fact that, after contract award, meetings occurred between Sperry employees, government employees and representatives of certain government contractors, none of which participated in the competition to begin phasing in the Sperry equipment. These meetings, held with Sperry's consent, included an oral and written explanation of the Sperry system. According to the Navy, participants were cautioned against unauthorized disclosures. The Navy has obtained affidavits from the 15 persons, other than Sperry representatives and government personnel, which attest to their nondisclosure of the information provided at the meetings. Sperry asserts that the meetings were open, that nondisclosure was not required, and that no precautions were taken other

than use of a sign-in sheet, which it believes may not have been signed by late arrivals. We find that the Navy has provided reasonable safeguards and assurance against the possibility of disclosure by having obtained the affidavits of the recorded participants. There is also no indication that any disclosure was other than incident to the conduct of the implementation of the award, or that it was made available to SDC personnel. Under the circumstances, we conclude that the disclosure the Navy made was suitable, and that further disclosure of other offerors' configuration based on the possibility that information regarding Sperry's proposal may have been disseminated would be unwarranted.

Sperry has also requested that we review all the original proposals and new best and final offers to determine whether they have been affected by the release of Sperry's prices and the alleged release of its configuration. We believe this exercise would be inappropriate. The release of price information is required in this situation, and can be expected to be taken into account by offerors. Regarding the alleged configuration release, we note that award was made to the technically acceptable offeror with the lowest evaluated price. Since SDC's initial offer was found technically acceptable by the Navy, we do not believe that SDC could have benefited by the type of technical leveling which Sperry suggests may have been made possible as the result of the alleged configuration disclosure.

The protest is denied.

[B-221506]

Contracts—Payments—Surety of Defaulted Contractor—Entitlement

A surety called upon to answer for its principal's default is subrogated to any funds due or to become due under the contract and this subrogation right relates back to the date of the bond. Therefore, a performance bond surety which completed contract performance after the contractor's default, has priority to proceeds of Armed Services Board of Contract Appeals award over the prime contractor and the contractor's assignee bank.

Matter of: Entitlement to Contract Payment—Department of the Air Force, July 14, 1986:

On September 15, 1985, the Armed Services Board of Contract Appeals (ASBCA) ruled that Western Mechanical Contractors, Inc., and Ben Matto (joint venture) (Western Mechanical or contractor) was entitled to payments totaling $15,915, plus interest, under contract number F38601-79-C-0010 with the Department of the Air Force. The contracting officer at Shaw Air Force Base requested our decision on whether the award should be paid to the contractor or the contractor's surety, or to an assignee bank. In our opinion, the surety should receive the payment.

FACTS

Western Mechanical was awarded the above-referenced contract in June 1977 for housing renovation at Shaw Air Force Base. On May 8, 1981, its rights to proceed were terminated under the authority of General Provision Number 5 of the contract entitled "Termination for Default-Damages for Delay-Time Extension." Nearly a year after its default and termination, on May 2, 1982, Western Mechanical executed an assignment of the monies due it under the contract to the Allied Lakewood Bank of Dallas.

Following termination, the surety on the contractor's performance bond, the Aetna Insurance Company, completed the project. However, for reasons not clear from the record, Aetna would not enter into the customary "takeover" agreement with the Air Force.[1] For this reason, the Air Force decided to make no payments to Aetna during the time the contract work was being completed, although Aetna had sent in several invoices during that time. The Air Force accepted the last unit of work in September 1982. The contracting officer, uncertain as to who was entitled to the contract funds, refused to release the final contract payment until Western Mechanical, Aetna, and the Allied Lakewood Bank came to an agreement as to its disbursement.

Eventually, the Air Force paid most of the remaining contract funds to Aetna pursuant to a joint letter to the Air Force Contracting Division at Shaw AFB, dated January 12, 1984. The amount of this payment was far less than the actual expenses Aetna's follow-on contractor incurred in completing the project. The Air Force withheld $5,515 from the payment because of defective lighting work which Western Mechanical had performed prior to its termination. It also withheld an amount assessed for liquidated damages because of late completion of project units. The letter, which was signed by representatives of the contractor, Aetna, and the assignee bank, stated:

> Each of us does hereby request and direct that all remaining contract funds * * * should be paid to Aetna Insurance Company * * *.
>
> Each of the undersigned parties does concur in this request and does assure you that it will make no claim against the Department of the Air Force or any other government entity or representative for misapplication or failure to pay these particular contract funds.

After Aetna took over performance of the contract, Western Mechanical appealed its default termination to the ASBCA. The Board denied Western Mechanical's appeal of termination for default. The Board did rule, however, that the contractor was entitled to recover $15,915, plus interest as provided in section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611 (1982). A portion of the award, $5,515, represented the amount which the Air Force had withheld from the final contract payment because of the defective lighting work. The Government conceded before the Board that the withheld amount was due because the follow-on contractor had corrected the lighting defects when it took over performance of the contract. The remaining $10,400 represented liquidated damages which the contracting officer assessed and withheld from the final contract payment but which exceeded the amount of liquidated damages to which the Government was entitled under the contract.

Apparently, all of the signatories of the joint letter of January 12, 1984, claim the ASBCA award. The contracting officer has attempted to have them agree on the payment of the award, but has been unable to do so. Consequently, he requested this decision on which of them—the contractor, the surety, or the assignee—is entitled to payment.

[1] While the presence or absence of a formal takeover agreement may be important in certain situations—see, e.g., 65 Comp. Gen. 29 (1985)—it is not relevant to this decision.

DISCUSSION

Aetna is entitled to the proceeds of the Board's award because, as performance surety, it has priority over the prime contractor and over the assignee bank. Also, as explained below, the joint letter agreement authorizes the Government to distribute the award proceeds to Aetna.

The courts have held consistently that a surety called upon to answer for its principal's default is subrogated to any funds due or to become due under the contract, and this subrogation right relates back to the date of the bond. *American Fidelity Co.* v. *National Bank of Evansville,* 105 U.S. App. D.C. 312, 266 F.2d 910 (1959). The courts have specifically applied this principle so as to allow a surety to collect contract funds over a defaulted prime contractor. *National Surety Corp.* v. *United States,* 319 F. Supp. 45 (N.D. Ala. 1970). Numerous court decisions have held under this rule that the rights of a surety to contract funds are also superior to those of the contractor's assignee. E.g., *Royal Indemnity Company* v. *United States and Jersey State Bank,* 371 F.2d 462, 464 (Ct. Cl. 1967) and cases cited therein; *National Surety Corp.* v. *United States,* 133 F. Supp. 381, 383; 132 Ct. Cl. 724, 727 (1955), cert. denied sub. nom. *First National Bank in Houston* v. *United States,* 350 U.S. 902. This principle has been applied where, similar to this case, the funds in dispute are derived from an award by an agency board of contract appeals made to a prime contractor on its claim for a rebate of liquidated damages assessed by the Government. *In re Cummins Const. Corp.,* 81 F. Supp. 193 (D.Md. 1948).

Furthermore, the decisions of this Office consistently apply the rule, in accord with the court decisions cited above, that a surety answering for a defaulted contractor has priority over the contractor and assignee bank to retained contract funds. *E.g.,* 64 Comp. Gen. (1985); 58 Comp. Gen. 295 (1979). This rule clearly applies in this case so as to entitle Aetna to recover the ASBCA award pro-

ceeds over Western Mechanical and the Allied Lakewood Bank since as surety it was called upon to perform under its performance bond in the manner discussed above.

Moreover, this conclusion is reinforced by the jointly-signed January 1984 letter which provides that "all remaining contract funds * * * should be paid to Aetna Insurance Company * * *." As discussed above, both items which comprise the award—excess liquidated damages assessed and the Air Force's claim amount for corrections for defective lighting—would have been included in those "remaining contract funds" if the Government had not erroneously withheld them at the time it made the final contract payment. Accordingly, we see no reason why these funds should not be viewed as encompassed by the January 1984 agreement.

[B-95136]

Leases—Repairs and Improvements—Limitations—Exemptions

The General Services Administration is authorized to make repairs and alterations to leased buildings without regard to the limitation set forth in Sec. 322 of the Economy Act of 1932, as amended (40 U.S.C. 278a (1982)) upon proper determination since section 210(a)(8) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 490(a)(8)), authorizes repairs and alterations to leased premises without regard to limitations when Administrator is otherwise authorized to maintain, operate and protect any building property or grounds inside or outside the District of Columbia and the Administrator of General Services is so authorized both as a result of transfer of authority effected by section 103 of the 1949 Act (40 U.S.C. 753) and by language contained in annual appropriation to GSA which makes funds available to operate, maintain and protect federally-leased buildings.

General Services Administration—Authority—Government Occupied Buildings

General Services Administration (GSA) is not required to obtain prospectus approval for repairs and alterations to leased buildings by section 7(a) of the Public Buildings Act of 1959, as amended (40 U.S.C. 606(a)) since leased buildings are not "public buildings" for purpose of that act and leases are not within meaning of "acquisition" for purpose of the 1959 Act.

Matter of: The Honorable Robert T. Stafford, Chairman, Committee on Environment and Public Works, July 16, 1986:

This letter is in response to the request dated September 16, 1985, signed by you and Senator Lloyd Bentsen, Ranking Minority Member, seeking clarification of the authority of the General Services Administration (GSA) to repair and alter leased premises in light of the Public Buildings Act of 1959 (1959 Act), as amended, 40 U.S.C. §§ 601-616 (1982) (the source of GSA's authority to repair and alter public buildings) as well as other provisions of law. During a meeting held prior to receipt of your formal submission, members of the committee staff indicated to representatives of this Office concern over the position taken by GSA that repairs and alterations to leased premises were not covered by the prospectus approval procedure contained in the 1959 Act. As explained by the

staff, it was GSA's opinion that leased buildings were not public buildings within the scope of the 1959 Act.

The committee staff members also expressed concern with the position taken by GSA that based upon section 322 of the Economy Act of 1932, as amended, 40 U.S.C. § 278a, it has authority independent of the 1959 Act to make repairs and alterations to leased premises. GSA's position is based upon the decision of this Office appearing at 29 Comp. Gen. 279 (1949). The committee staff expressed the view that 40 U.S.C. § 278a imposed a limitation on spending funds for repairs and alterations to leased premises but that it did not constitute an authorization to repair and alter leased premises. Consequently, we were asked to review these specific issues (including reconsideration of our decision in 29 Comp Gen. 279, *supra*) as part of our response to your inquiry.

As agreed to by members of the committee staff and in order to fully respond to the issues raised, we requested and received a report on this matter from the Adminstrator of General Services. His views were considered during preparation of our response. For the reasons explained in detail in the enclosed Appendix, we find that GSA does have authority independent of the 1959 Act to alter and repair leased premises. We therefore affirm our 1949 decision to that effect. As a result GSA is not required to obtain prospectus approval for appropriations in excess of $500,000 for alterations to leased premises pursuant to section 7(a) of the 1959 Act.

Unless you publicly announce its contents earlier, we will not distribute copies of this opinion until 30 days from its date.

GSA'S AUTHORITY TO REPAIR AND ALTER LEASED SPACE

The following discussion provides a historical review of the various aspects of holdings by the Comptroller General (and his predecessor, the Comptroller of the Treasury) concerning the authority of Government officers to expend public funds for repairs and alterations to privately owned property.

Generally, prior to 1932 it had been the position of the accounting officers of the Government that permanent improvements to private property (including leased premises) could not be made using public funds [1] unless made pursuant to stipulations in lease agreements that the alterations, repairs or improvements were part of the consideration under the lease.[2] The reasoning was that

[1] 5 Comp. Gen. 696 (1926); 5 Comp. Gen. 366 (1925); 2 Comp. Gen 606 (1923); Comp. Dec. 142 (1899); and, 5 Comp. Dec. 478 (1899).

[2] A-33513, Oct. 10, 1930; 5 Comp. Gen. 696 (1926); 5 Comp. Gen. 366 (1925); Comp. Gen. 606 (1923); 6 Comp. Dec. 943 (1900); 6 Comp. Dec. 142, 146 (1899); Comp. Dec. 135 (1899); and 3 Comp. Dec. 196 (1896). *See* 18 Comp. Dec. 70 (1911) holding that the Government would not be liable for the expenses of permanent improvements or repairs and alterations to rented buildings unless provided for in the

to permit the improvements would constitute a gratuity to the owner which Government officials are not authorized to make in the absence of statutory authority.[3] While this would be the case in situations where the Government derived no benefit from paying for the improvements in question, it was also realized that in many instances there was a benefit to the Government as a result of making permanent improvements to private property. It was therefore recognized that the prohibition was one of public policy, not statutory prohibition, so that in appropriate circumstances, alterations to leased premises would be proper.[4] Consequently, if agencies had authority to lease property, they were considered to have authority to make repairs or improvements thereto as part of the bargained-for consideration under the lease.

Against this background, the Congress enacted section 322 of the Economy Act of 1932,[5] which provided in pertinent part that:

> After June 30, 1932, no appropriation shall be obligated or expended for the rent of any building or part of a building to be occupied for Government purposes at a rental in excess of the per annum rate of 15 per centum of the fair market value of the rented premises at the date of the lease under which the premises are to be occupied by the Government nor for alterations, improvements, and repairs of the rented premises in excess of 25 per centum of the amount of the rent for the first year of the rental term, or for the rental term if less than one year: * * *[6]

While admittedly the purpose of this provisions was to limit the amount the Government expended in repairs, alterations or improvements to leased premises, it otherwise left unchanged the basic authority of Government agencies to make permanent improvements to privately owned property. It was identified in later decisions as being both a limitation on agency authority to repair and improve leased premises and an authorization to act up to the stated percentage limitations when making repairs and improvements to leased premises.[7] These decisions did not conclude that the inherent authority of Government officers to make permanent improvements to private property as part of the bargained-for consideration of a lease was affected by the provisions.[8]

[3] 6 Comp. Dec. 943, 944 (1900) and 6 Comp. Dec. 135, 141 (1899). Decisions by the Comptroller General supporting this proposition were all found to be made since 1932. *See,* for example, 53 Comp. Gen. 351, 352 (1973); 42 Comp. Gen. 480 (1963); 39 Comp. Gen. 304, 306 (1959); 38 Comp. Gen. 143 (1958); and 35 Comp. Gen. 715 (1956).

[4] B-198629, July 28, 1980; B-187482, Feb. 17, 1977; 55 Comp. Gen. 872 (1976); 53 Comp. Gen. 351 (1973); 47 Comp. Gen. 61 (1967); 46 Comp. Gen. 25 (1966); and 42 Comp. Gen. 480 (1963).

[5] Act of June 30, 1932, ch. 314. 47 Stat. 412, 40 U.S.C. § 278a (1940).

[6] This provision was intended to address the problem caused by agencies requesting and receiving extensive repairs to quarters that were intended for agency occupation only temporarily, pending construction of public buildings. S. Rep. No. 756, 72d Cong., 1st Sess., accompanying the Legislative Branch Appropriation Bill, 1933 (Economy Act), 15 (1932).

[7] 53 Comp. Gen. 317 (1973); 42 Comp. Gen. 480 (1963); 29 Comp. Gen. 279 (1949); 21 Comp. Gen. 906 (1942); and B-198629, July 28, 1980.

[8] *See* 27 Comp. Gen. 389 (1948) explaining that this provision was intended to serve as a limitation on prior authority.

Thereafter, when considering the scope of the Economy Act of 1932, we held that the limitation on repairs, alterations and improvements applied only to permanent improvements and not to temporary, removable tenant's fixtures;[9] that it did not apply to unimproved land;[10] and that it applied only to alterations and repairs paid for directly by the Government.[11]

Additionally, immediately following creation of GSA by section 103 of the Federal Property and Administrative Services Act of 1949 (1949 Act), as amended, 40 U.S.C. § 753 (1982), the 1949 Act was amended by addition of a new section 210, which provides as follows:

> OPERATION OF BUILDINGS AND RELATED ACTIVITIES
>
> Sec. 210. (a) *Whenever* and to the extent that *the Administrator* has been or hereafter *may be authorized by any provision of law other than this subsection to maintain, operate, and protect any building, property, or grounds situated in or outside the District of Columbia,* including the construction, repair, preservation, demolition, furnishing, and equipment thereof, *he is authorized* in the discharge of the duties so conferred upon him—
>
> * * * * * * *
>
> (8) *to repair, alter, and improve rented premises, without regard to the 25 per centum limitation of section 322 of the Act of June 30, 1932 (47 Stat. 412),* as amended, upon a determination by the Administrator that by reason of circumstances set forth by the Administrator in such determination the execution of such work, without reference to such limitation, is advantageous to the Government in terms of economy, efficiency, or national security. * * * [Italic supplied.] 40 U.S.C. § 490(a)(8) (1982).

We note that prior to June 30, 1949, the authority to acquire space for use of Federal agencies (by construction, purchase or leasing) and the responsibility for custody, control and management of Government-owned or Government-leased space (with certain exceptions) was vested in the Federal Works Agency (including its constituent element, the Public Buildings Administration).[12] Section 103 of the 1949 Act, as amended, 40 U.S.C. § 753 (1982), transferred to the Administrator of General Services all functions of the Federal Works Agency and all agencies thereof (including the Public Buildings Administration) and all functions of the Public Works Administrator and the Commissioner of Public Buildings.

We note that section 210(f) of the 1949 Act, as amended, 40 U.S.C. § 490(f) (1982), established the Federal Buildings Fund from which the Congress annually appropriates funds for real property management. These appropriations are made "available for necessary expenses of real property management and related activities

[9] 30 Comp. Gen. 76 (1950); 29 Comp. Gen. 279 (1949); 20 Comp. Gen. 105 (1940); 18 Comp. Gen. 144 (1938); B-71640, Dec. 30, 1947; and, B-50694, Aug. 2, 1945.

[10] 38 Comp Gen. 143 (1958) and B-126950, March 12, 1956.

[11] 59 Comp. Gen. 658 (1980).

[12] 40 U.S.C. §§ 1, 8-13, 14, 15-19, 36, 37a, 285, 304a-304e, 341-348 (1946 and Supp III 1949).

not otherwise provided for * * * including operation, maintenance, and protection of federally-owned and leased buildings." [13]

Thus, there is ample authority for the Administrator of General Services to make alterations, repairs and improvements to private property, including leased premises without regard to the limitations contained in section 322 of the Economy Act of 1932.[14]

APPLICABILITY OF PUBLIC BUILDINGS ACT OF 1959 TO REPAIRS AND ALTERATIONS OF LEASED BUILDINGS

Members of the Committee staff have suggested that repairs and alterations to leased premises are subject to prospectus approval under section 7(a) of the 1959 Act on the grounds that alterations to all public buildings are covered by section 7(a) and that leased premises are public buildings under the 1959 Act. We have reviewed the 1959 Act and relevant amendments to the 1959 Act as well as the legislative histories of these laws but do not find support for this position. Our review persuades us that repairs and alterations to leased premises are not subject to prospectus approval under section 7(a) of the 1959 Act.

Section 7(a) of the 1959 Act, as initially enacted provided:

> In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 4, no appropriation shall be made to construct any public building *or to acquire any building to be used as a public building* involving an expenditure in excess of $100,000, and no appropriation shall be made to *alter any public building* involving an expenditure in excess of $200,000, if such construction, alteration, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively.[15] [Italic supplied.]

Meaning of Acquisition

Section 13 of the 1959 Act, which provides definitions for many of the words or terms used in that Act, does not include a definition for the word "acquire." Section 3 of the 1959 Act, provides that:

> The Administrator is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, any building and its site which he determines to be necessary to carry out his duties under this Act.[16]

[13] *See* for example, 1986, Treasury, Postal Service and General Government Appropriation Act for 1986 (H.R. 3036) as adopted by section 101(h) of the Joint Resolution making further continuing appropriations for the fiscal year 1986, Pub. L. No. 99-109, December 19, 1985, 99 Stat. 1291 and the 1985 Treasury, Postal Service and General Government Appropriation Act for 1985 (H.R. 5798) as adopted by section 101(j) of the Joint Resolution making continuing appropriations for the fiscal year 1985, Public Law 99-473, October 12, 1984, 98 Stat. 1963.

[14] The limitation on annual rental not exceeding 15 per centum of the fair market value of the premises at the time of the lease was permanently suspended in 1983. *See* our decision to the Federal Aviation Administration—Limits on Rent Payments, B-217884, Feb. 18, 1986, 65 Comp. Gen. 302.

[15] Pub. L. No. 86-249, § 7(a), September 9, 1959, 73 Stat. 480, 40 U.S.C. § 606(a) (1964).

[16] 40 U.S.C. § 602 (1982).

The report of the House Committee on Public Works explains the purpose of this provision as follows:

> The third section authorizes the Administrator to acquire any building and its site which he determines to be necessary to carry out his duties under the bill. The Administrator is authorized to acquire any such building by purchase, condemnation, donation, exchange or any other fashion *which would result in the United States becoming the owner of the property.* H.R. Rep. No. 557, 86th Cong., 1st Sess., 7 (1959). [Italic supplied.]

A statement in the Senate Committee on Public Works report acccompanying the bill which ultimately became the 1959 Act also suggests the finding that building acquisitions under section 3 of the 1959 Act did not include acquisition through leasing. It follows that prospectus approvals under section 7 of the 1959 Act, required in connection with the acquisition of public buildings, likewise did not include proposed acquisitions by leasing since the same terms or words used in different sections of the same act should be construed consistently unless there is clear legislative intent to the contrary.

Meaning of Public Building

On the question of whether the term "public building" as used in the 1959 Act should be interpreted as including leased space, we note that there is no rule governing whether a leased building should be considered to be a "public building" in construing that term in any given statute. It is not a word of art.

While section 13(1) of the 1959 Act, 40 U.S.C. § 612 (1982) defines the term "public building," [17] it does not mention whether leased buildings are included within its scope. However, the legislative history suggests that leased space was not intended to be included. For example, the Senate report on the bill which ultimately became the 1959 Act stated as follows concerning section 13:

> This section defines seven terms which are used throughout the bill in order to insure that they will have the same meaning throughout the bill. One of the most important of the defined terms is that of "public buildings." The definition of this term is substantially that which the Congress has established in the Public Buildings Act of 1926 and in the various acts which amend it and which supplement it. The definition is explicit in stating those buildings which are included within the scope of the bill, as well as those which are excluded. It is limited to those types and classes of buildings which historically have been the responsibility of the Administrator and his predecessors in function. Further, flexibility in coverage is allowed by permitting the President to include or exclude buildings or construction projects which he deems to be justified in the public interest except that he may not bring a

[17] 40 U.S.C. § 612(1) provides:

> As used in this chapter—
>
> (1) The term "public building" means any building, whether for single or multitenant occupancy, its grounds, approaches, and appurtenances, which is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, and shall include: (i) Federal office buildings, (ii) post office, (iii) customhouses, (iv) courthouses, (v) appraisers stores, (vi) border inspection facilities, (vii) warehouses, (viii) record centers, (ix) relocation facilities, and (x) similar Federal facilities, and (xi) any other buildings or construction projects the inclusion of which the President may deem from time to time hereafter, to be justified in the public interest; * * *

specifically excluded type of building under the law." S. Rep. No. 694, 86th Cong., 1st Sess., 8 (1959).

Since the Public Buildings Act of 1926, as amended, was concerned with the construction or purchases, as opposed to the leasing, of buildings by the Government, the Senate report supports an interpretation of the term "public buildings" which would not include those acquired by lease. In addition, the reports of the House and Senate Public Works Committees accompanying the 1959 Act focus their attention upon a historical analysis of laws relating to acquisition of ownership interest by the Government when speaking of public buildings. *See* S. Rep. No. 694, 86th Cong., 1st Sess. 1-3 (1959) and H.R. Rep. No. 557, 86th Cong., 1st Sess., 3-7 (1959). Furthermore, a reading of the law as passed in 1959 shows the term "public building" is generally used in conjunction with the words construction or acquisition, but not leasing. As we have already indicated, the term "acquire" when used in the 1959 Act does not include acquiring buildings by leasing.

Finally, section 16 of the 1959 Act, as amended, 40 U.S.C. § 615, provides:

> Nothing in this Act shall be construed to limit or repeal—
> (1) existing authorizations for the leasing of buildings by and for the use of the General Services Administration * * *.

This provision further demonstrates that the prospectus approval provision of the 1959 Act, when enacted, did not apply to leased buildings.

Effect of 1972 Amendment to section 7(a) of 1959 Act

The Public Buildings Amendments of 1972 amended the prospectus approval requirement of section 7(a) of the 1959 Act to read as follows:

> In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 4, no appropriation shall be made to construct, alter, purchase, or to acquire any building to be used as a public building which involves a total expenditure in excess of $500,000 if such construction, alteration, purchase, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively. No appropriation shall be made to lease any space at an average annual rental in excess of $500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively. 40 U.S.C. § 606(a) (1982).

While section 7 (a) was thus changed, no change was made to section 3 to include leasing within the ambit of acquisitions authorized by that section or to section 13 to specifically include it within the definition of public buildings.

The amendment quoted above expressly added a separate requirement for prospectus approval for appropriations made to "lease any space at an average annual rental in excess of $500,000 for use for public purposes" rather than including leasing within the first prohibition even though the first prohibition also was amended to require prospectus approval prior to appropriations made to "construct, alter, purchase, or to acquire any building to be used as a public building." In our view, this demonstrates an intent to distinguish between the use of the term "public buildings" and the use of the phrase "space for use for public purposes" in the two prospectus approval requirements. In summary, we have found that the term, "public buildings", did not include leased property prior to the 1972 amendments for purposes of the 1959 Act, and the 1972 amendment to section 7 of the 1959 Act did nothing to change this. Consequently, since the requirement for prospectus approval for alterations in excess of $500,000 applies only to alterations to public buildings, we agree with GSA that it is not required to obtain prospectus approval of alterations to leased premises.

[B-222200.3]

Contracts—Small Business Concerns—Awards—Set-Asides—Propriety

Determination to set aside procurement for full food services at military base under section 8(a) of the Small Business Act may be made after bid opening where agency reasonably determined that cancellation of total small business set-aside procurement and subsequent 8(a) award were clearly in the government's interest due to urgency of the requirement and the necessity of maintaining continuous food services after expiration of incumbent's contract which did not allow sufficient time to complete small business set-aside procurement.

Matter of: Exquisito Services, Inc., July 17, 1986:

Exquisito Services, Inc. (ESI), protests the post-bid-opening cancellation of invitation for bids (IFB) No. F41800-86-B-A059, issued as a total small business set-aside by the Department of the Air Force for full food services at Lackland Air Force Base, Texas. ESI also protests the subsequent sole-source award by the Air Force of a contract for this same requirement to Aleman Food Services, Inc. (Aleman), pursuant to the Small Business Administration's (SBA) section 8(a) program.[1] ESI, which is itself an eligible minority owned small business under SBA's section 8(a) program,[2] contends that the Air Force illegally canceled the competitive solicitation under which ESI was potentially in line for award. ESI requests that the section 8(a) contract be terminated, that the canceled solicitation be reinstated, and that the Air Force proceed to select the

[1] Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the SBA to enter into contracts with any government agency with procuring authority and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to let a contract to the SBA upon such terms and conditions as may be agreed upon by the procuring agency and the SBA. *Marine Industries Northwest, Inc.; Marine Power and Equipment Co.*, 62 Comp. Gen. 205, 208 (1983), 83-1 CPD ¶ 159.

[2] We have been advised by the Air Force that on June 6, 1986, the Dallas Regional Office of the SBA made a determination that ESI is no longer a small business for the purposes of food services requirements and that ESI is currently appealing this determination.

low, responsive and responsible bidder under the competitive solicitation.

ESI also filed suit in the United States District Court for the Eastern District of Louisiana, *Exquisito Services, Inc.* v. *United States of America,* Civil Action No. 86-1847, seeking injunctive and declaratory relief. The court has expressed an interest in our decision and performance of the contract has been stayed pending our ruling.

We deny this protest.

BACKGROUND

The solicitation was issued on January 17, 1986, and, as amended, established March 18, 1986, as the bid opening date. Seven bids were received as follows:

Bidder	Total Price—basic and 2 option years
Mid-East	$25,679,844.20
Dragon	$26,385,771.70
Exquisito	$27,258,303.00
Aleman	$27,902,622.76
WD & M	$29,273,013.00
Taylor Group	$30,832,008.61
Falcon	$30,907,049.50

The low bidder withdrew its bid because of a mistake in its bid and the second low bidder was found to have submitted a nonresponsive bid, leaving ESI and Aleman as the low bidder and the second low bidder, respectively. In early April, the Air Force requested ESI to verify its bid. ESI did so, but concurrently alleged that certain clerical errors existed in its bid.[3] Also, on April 17, the contracting officer informed ESI that the individual sureties listed in its bid bond did not have sufficient net worth; this deficiency was corrected by ESI on April 21. At about this time, an Air Force procurement official was informed by officials at Barksdale Air Force Base, Louisiana, where ESI was performing a $1.2 million mess attendant contract, that ESI was experiencing financial problems meeting employee payrolls, that its company checks were "bouncing," that the Department of Labor was considering an investigation, and that ESI had recently filed for bankruptcy.

[3] In response to the Air Force request, ESI submitted "verification" letters, which included the alleged clerical errors, on three separate occasions to the Air Force—April 2, 10, and 22, 1986. The clerical errors amounted to approximately $3,000 out of a total bid price of approximately $27 million and would have had no effect on the relative standing of bidders.

The Air Force, on April 8, issued a "preliminary notice" to the incumbent, Falcon Management, Inc., that the Air Force "may" exercise an option to extend the food services being performed under the existing contract, which otherwise was to expire on April 30. However, because of oversight, the Air Force failed to exercise the option until April 17, even though the contract specifically required that such an extension "be effected by written notice mailed . . . to the contractor not less than 15 calendar days prior to expiration of the contract." Falcon refused to honor the late exercise of the option and, instead, submitted what the Air Force considered to be an unreasonable "counter-offer" on April 21, 1986.[4] Faced with time constraints and the necessity of maintaining continuous food services for military personnel, the contracting officer considered canceling the solicitation and performing the services in-house or canceling the solicitation and awarding a contract to the SBA under the 8(a) program. The contracting officer chose not to negotiate a contract or a modification of the existing contract on a sole-source basis with the incumbent for an interim period pending completion of the competitive procurement because he believed that unspecified provisions of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, prohibited him from doing so. The contracting officer also did not attempt to competitively negotiate an interim contract pending completion of the competitive procurement because he believed there was insufficient time. Rather, the contracting officer awarded the contract to the SBA which had submitted an 8(a) subcontract proposal on behalf of Aleman even though an Air Force official had previously proposed to the SDA that the 8(a) subcontract award be split between ESI and Aleman.[5] The protest by ESI followed.

CONTENTIONS BY ESI

The thrust of ESI's complaint is that the Air Force did not have a "compelling reason" to cancel the solicitation after bid opening. ESI argues that the Air Force's requirement to provide for interim food services during the short period of time necessary to complete the competitive procurement did not provide a valid basis for canceling the competitive solicitation and awarding a sole-source 8(a) contract. ESI maintains that the Air Force had a variety of possible alternative contract actions available to it in order to provide

[4] The "counter-offer" by Falcon was in the amount of $853,950.75 per month for 2 months. This represented an increase of $154,440.98 per month compared with the previous contract. The Air Force rejected the "counter-offer" and did not attempt to negotiate a more reasonable price.

[5] The section 8(a) award to Aleman was made at a price of $27,580,462, computed for the three year performance period (basic year and 2 option years) contained in the competitive solicitation. This figure is $322,161 less than Aleman's previous bid price but $1,359 more than ESI's bid price (without correcting for any alleged mistake in the competitive solicitation. The record does not contain an explanation of how the specific final price was arrived at by the parties.

for any short-term need for continuous food services. According to ESI, the cancellation therefore was arbitrary and capricious. ESI also challenges the validity of the 8(a) award, alleging that the award was tainted by bad faith and by violation of various regulations and SBA's standard operating procedures.

ANALYSIS

ESI is correct as to the general rule that governs the cancellation of a solicitation after bid opening: award should be made to the responsible bidder which submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the solicitation. *See* Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1(a)(1) (1985). However, this does not mean that a decision to invoke the section 8(a) process may not be made after bid opening has occurred. The FAR specifically permits cancellation, consistent with the compelling reason standard, where cancellation is clearly in the government's interest. 48 C.F.R. § 14.404-1(c)(9) (1985). Moreover, our Office has specifically upheld the propriety of canceling a solicitation after bid opening for the purpose of setting aside a procurement under the section 8(a) program. See *A.R.&S. Enterprises, Inc.*, B-194622, June 18, 1979, 79-1 CPD ¶ 433; *American Dredging Co.*, B-201687, May 5, 1981, 81-1 CPD ¶ 344. The "compelling reason" standard, relied upon by the protester, is based in part upon the obvious detrimental effect on the competitive bid system of a cancellation and resolicitation after exposure of bid prices. See, e.g., *Gill Marketing, Co. Inc.*, B-194414.3, Mar. 24, 1980, 80-1 CPD ¶ 213 at 2. Here, however, because of the 8(a) award, there will be no resolicitation and there will be no future auction situation resulting from exposure of bid prices.

The Air Force experienced a number of delays in the present procurement, including: issuing five amendments changing or clarifying the requirements; resolving a potential contracting agency-level protest and a protest filed with our Office; resolving a mistake in bid claimed by Mid-East, the apparent low bidder, and allowing withdrawal of its bid; and determining that the second low bidder, Dragon, was nonresponsive. Also, in view of the information the contracting officer had received from various sources reporting ESI's possible financial difficulties and payroll problems at Barksdale Air Force Base, the contracting officer foresaw that a preaward survey and potentially a certificate of competency proceeding might be required before the matter of ESI's responsibility could be determined. Since this and resolution of the alleged mistakes in ESI's bid might further delay a possible award, the contracting officer attempted unsuccessfully to exercise the Air Force's option to extend the incumbent's contract for 2 months.

When the incumbent refused to accept the Air Force's late exercise of the option and the Air Force received what it considered to be an exorbitant counter-offer from the incumbent on April 21, the Air Force was faced with an urgent and difficult situation since only a little more than 1 week remained before expiration of the incumbent's contract. The contracting officer considered it imperative that Air Force maintain continuous food services for personnel at the base since lack of such services would have an adverse impact on the base's mission and would be detrimental to the health morale and welfare of Air Force personnel. The contracting officer considered several alternative ways to avoid a lapse in food services. Ultimately, the contracting officer determined that the SDA's 8(a) program was a prompt and viable solution to the problem. The Air Force referred the requirement to the SBA, identified both Aleman and EST as candidates for an 8(a) subcontract, and recommended that the requirement be split equally between the two firms. The SBA selected Aleman for the 8(a) award and, on April 23, the original set-aside procurement was canceled and the 8(a) contract was awarded to the SBA and Aleman.

We think it is clear that the contracting officer was faced with an urgent need to maintain continuous food services. In view of the extremely short time period within which it was necessary to award the follow-on contract, the probable adverse effects on the health, welfare and morale of Air Force personnel, and the broad discretion conferred upon the SBA and the contracting agency to decide when and to whom to award an 8(a) contract, we find the contracting officer's determination that cancellation of the original procurement was clearly in the public's interest to have been reasonable under the circumstances. *Marine Industries Northwest, Inc.; Marine Power and Equipment Co.*, 62 Comp. Gen. at 208, 83-1 CPD ¶ 159 at 4; FAR, 48 C.F.R. § 14.401-1(c)(9) (1985). In this regard, the protester argues that several reasonable alternatives, other than an 8(a) award, existed which could have satisfied the Air Force's interim need for food services and, at the same time, permitted completion of the procurement. Even if we assume this to be true, we cannot say that the contracting officer, faced with urgent circumstances, acted unreasonably in opting for another viable alternative clearly available to the Air Force: an 8(a) award to the SBA. Accordingly, we conclude that all of the above circumstances taken together did in fact provide the contracting officer with a compelling reason to cancel the initial procurement and to award to Aleman under the auspices of the SBA's 8(a) program.

ESI also argues that SBA, in selecting Aleman, violated certain internal standard operating procedures (SOP) which, according to ESI, evidences bad faith. A protester alleging bad faith by government officials bears a very heavy burden of proof. To establish bad faith, the courts and our Office require virtually irrefutable proof that either Air Force or SBA officials had a specific and malicious intent to injure ESI. See *Kalvar Corporation, Inc.* v. *United States*, 543 F.2d 1298 (Ct. Cl. 1976); *Bradford National Corporation*, B-

194789, Mar. 10, 1980, 80-1 CPD ¶ 183. ESI asks that we infer bad faith from the alleged SOP violations. However, contracting officials are presumed to act in good faith, *Arlandria Construction Co., Inc.—Reconsideration,* B-195044 *et al.,* July 9, 1980, 80-2 CPD ¶ 21, and inference and supposition are not sufficient to meet this burden. *Janke and Company, Inc.—Request for Reconsideration,* 64 Comp. Gen. 63 (1984), 84-2 CPD ¶ 522.[6]

ESI also argues that the Air Force failed to comply with 48 C.F.R. § 19.506(a) (1985), which requires notification to the small and disadvantaged business utilization specialist and the assigned SBA representative of the withdrawal of the small business set-aside. While the Air Force may not have notified the SBA officials identified in this section of the FAR, it is abundantly clear that appropriate officials of the SBA were consulted by the contracting officer regarding withdrawal of the solicitation and especially regarding the feasibility of awarding an 8(a) contract to either ESI or Aleman, or both. Thus, we think that even though the exact notification procedure may not have been followed, the Air Force complied with this requirement in substance.

Finally, ESI also objects to the award of the 8(a) contract at a price higher than its own. However, the fact that an 8(a) firm's price under the set-aside may be higher than the protester's in the canceled procurement is not legally objectionable. Under the 8(a) program, it is not unusual for contracts to be funded in amounts exceeding prices that would be obtained through unrestricted competition. See e.g., *Kings Point Manufacturing Co., Inc.,* 54 Comp. Gen. 913 (1975), 75-1 CPD ¶ 264. Such 8(a) set-aside contracts are made in order to assist small business concerns owned and controlled by socially and economically disadvantaged persons to achieve a competitive position in the marketplace. The government, by increasing the participation of such firms in federal procurements, anticipates that these firms eventually may become self-sufficient, viable businesses capable of competing effectively in unrestricted procurements. Whatever additional price the government may pay when it uses 8(a) set-asides is merely the cost of furthering this socioeconomic goal. Thus, a higher priced contract may be awarded under the 8(a) set-aside.

The protest is denied.

[6] It is not clear from the record why SBA decided to select Aleman for the section 8(a) award rather than ESI. Nevertheless, in view of the the broad discretion conferred upon the SBA and the contracting agency to decide when and to whom to award an 8(a) contract, our Office will not question the selection of an 8(a) contractor unless the protester demonstrates fraud or bad faith on the part of government officials or that applicable regulations have not been followed. *Arawak Consulting Corp.,* 59 Comp. Gen. 522 (1980), 80-1 CPD ¶ 404. An allegation that SBA's SOP's were violated does not satisfy this requirement, *Janke and Company, Inc.,* B-216152, Aug. 30, 1984, 84-2 CPD ¶ 242, since the SOP's are primarily for the internal guidance of agency employees and may be waived or revoked by the SBA. *Jets Services, Inc.,* 65 Comp. Gen. 311, B-199721, Mar. 11, 1981, 81-2 CPD ¶ 300.

[B-222912]

Contracts—Negotiation—Competition—Failure to Solicit Proposals From All Sources

Protest that agency failed to obtain full and open competition because the incumbent contractor did not receive a solicitation package and was not otherwise informed by the agency that a new solicitation had been issued is denied where the agency complied with the statutory and regulatory requirements regarding publicizing the procurement and the incumbent had reason to know that its address on the agency's mailing list for the solicitation was incorrect.

Matter of: NRC Data Systems, July 18, 1986:

NRC Data Systems protests any award of a contract under request for proposals (RFP) No. 86-34(N), issued for data conversion services by the Department of Health and Human Services' Centers for Disease Control, Atlanta, Georgia. NRC complains that even though it was the incumbent contractor performing the agency's current requirement for these services, the agency failed to provide it with a copy of the solicitation prior to the closing date for receipt of proposals. We deny the protest.

The agency announced in the Commerce Business Daily (CBD) on October 2, 1985, its intention to issue a competitive solicitation for the required services. There was also notice concerning this procurement in the CBD on November 22. The announced, anticipated issuance date was November 1, but the agency did not actually issue the solicitation until January 30, 1986. The closing date was March 3. The agency reports that it mailed solicitations to 77 firms on its list of potential offerors and that NRC was included on the mailing list. The list shows NRC's address as: 1935 Cliff Valley Way, Suite 118, Atlanta, Georgia 30229. That address is correct except for the zip code. The correct zip code is 30329. The agency received three timely proposals.

NRC contends that it has never received a copy of the RFP by mail.[1] The protester adds that it had experienced other problems with mail misaddressed by the agency, although there is no allegation that other misaddressed mail was not ultimately received. NRC says that it fully expected to be solicited since it was performing satisfactorily as the incumbent. Moreover, says the protester, its representative inquired of the agency several times prior to January 30 as to when the solicitation would be issued, but the person to whom the representative spoke said she did not know. In addition, when the protester signed an extension of its current contract on January 28, no one in the agency's procurement office informed the firm that the solicitation would be issued only 2 days hence. Even after the solicitation was issued, says the protester, it had additional contacts with the procurement office concerning payments under its current contract, but was not informed that the new so-

[1] The agency reports that no solicitations were returned by the Postal Service as undeliverable and that each solicitation package contained a return address.

licitation had been issued. The firm says it first learned that the agency had issued the solicitation the day after the closing date when it telephoned the agency on a matter involving its current contract. The protester adds that just prior to the closing date, several of its telephone calls to a specific agency official were not returned.

The protester contends that the agency should either accept its late proposal or resolicit the requirement because the agency failed to obtain full and open competition as required by the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253(a)(1)(A) (Supp. II 1984). In support of this contention, the protester relies heavily on *The Thorson Co.*, GSBCA No. 8185-P, Oct. 30, 1985, 85-3 BCA ¶18,516. In that case, the General Services Board of Contract Appeals required a resolicitation where the incumbent contractor did not receive a copy of the solicitation. Although the agency established that it had the incumbent's correct address and that it mailed the solicitation to the incumbent, it failed specifically to allege or prove that it had mailed the solicitation to the correct address. The Board noted a history of the agency's sending mail to the incumbent at an old address that now is used by a competitor. The Board concluded that since only the incumbent's competitor submitted an offer, full and open competition was not obtained. NRC contends that its case is more compelling than Thorson's because, here, the facts show that the agency mailed the solicitation to the wrong address.

The agency's position is, first, that the protester had adequate notice of the new solicitation. The agency refers to the two CBD notices and also says that it posted a notice of the issuance of the solicitation on the bid board at the contracting office. The agency says it took all reasonable steps to ensure that NRC was notified of the procurement and did not discover until after the closing date that the firm may not have received its copy of the RFP. But, in any event, says the agency, adequate competition and reasonable prices were obtained, and there is no indication that NRC was deliberately excluded from the competition. The agency cites a number of our prior cases holding that, under such circumstances, a potential offeror bears the risk of nonreceipt of solicitation materials. See, e.g., *CompuServe,* B-192905, Jan. 30, 1979, 79-1 CPD ¶63.

Under CICA, agencies are required when procuring property or services to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. II 1984). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." *Id.* §§ 259(c); and 403(7). We have said that in view of the clear intent of Congress to make full and open competition the standard for conducting government procurements, we will give careful scrutiny to an allegation that a particular firm was not provided an opportunity to compete for a particular contract. *Trans World Maintenance, Inc.*, B-220947, Mar. 11, 1986, 65 Comp. Gen. 401, 86-1 CPD ¶239. In so doing, we will take into account all of the circumstances surrounding a firm's nonreceipt of solicitation materials, as well as the agency's explanation. *Id.* Using this approach, we have sustained protests and recommended resolicitation where we found that a firm's failure to receive a solicitation was the result of significant deficiencies on the part of the agency. See *Trans World Maintenance, Inc.*, B-220947, *supra; Dan's Moving & Storage, Inc.*, B-222431, May 28, 1986, 86-1 CPD ¶496.

On the other hand, the government cannot guarantee that mistakes will never occur, even when proper procedures are followed. Thus, in other cases decided following the effective date of CICA, we have declined to disturb procurements in which an agency contributed to a contractor's nonreceipt of solicitation materials where it did not appear that the agency's contribution was anything more than mere inadvertence. See, e.g., *Leavenworth Office Equipment,* B-220905, Nov. 12, 1985, 85-2 CPD ¶543 (agency mistakenly misaddressed solicitation package intended for the incumbent contractor); *James L. Clark, Jr., Plumbing and Heating Co., Inc.,* B-220673, Oct. 29, 1985, 85-2 CPD ¶484 (agency's failure to send amendment to the protester was apparently an isolated oversight).

Although the CICA standard of full and open competition requires an agency to take reasonable steps to ensure that a procurement is open to all responsible sources, that requirement should not be read so broadly as to require an agency either to accept a late submission or to resolicit whenever the agency contributes to a prospective contractor's failing to receive solicitation materials in a timely manner. Not only would this be inefficient from the government's perspective, but the integrity of the system would be undermined if the other bidders or offerors could not rely on the finality of bid or proposal closing dates. Rather, we think an agency has satisfied CICA's full and open competition requirement when it makes a diligent, good-faith effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials, and it obtains a reasonable price. The fact that inadvertent mistakes occur in this process should not in all cases be grounds for disturbing the procurement.

In this case, we think the agency satisfied CICA's full and open competition requirement. The agency published two notices in the CBD concerning this procurement and mailed solicitations to 77 bidders on its mailing list. Although this list contained an incorrect zip code for NRC, there is no indication that the agency was aware of this fact. Moreover, we note that two modifications to NRC's current contract, which NRC signed on December 23, 1985, and either January 27 or 28, 1986, respectively, each contained the incorrect zip code: 30229. Significantly, one of the express purposes of the first of these modifications was to correct NRC's address, since the firm recently had moved. Having signed the modification with the

incorrect zip code, NRC should have known that the agency's contracts office probably did not have the firm's correct address on the bidders list. Yet, there is no indication that NRC ever attempted to assure itself that the address on the list was correct. In view of the numerous misaddressed items the protester received from both the agency's finance office and its contracts office, we think such an inquiry would have been prudent. Further, although agency personnel apparently did not advise NRC that the new solicitation had been issued, even though NRC had a number of contacts with the agency following the issuance date, NRC does not allege that after the issuance date, it ever expressly asked whether the solicitation had been issued.

Finally, with respect to NRC's contention that the holding in *The Thorson Co.*, GSBCA No. 8185-P, *supra*, controls here, we have considered that case previously in *G & L Oxygen and Medical Supply Services*, B-220368, Jan. 23, 1986, 86-1 CPD ¶78, but found it to be distinguishable. We said the decision in *Thorson* appeared to be based on the fact that only one offer had been received, and that offer was from a competitor to whom the protester's solicitation package may have been sent. In this case, however, the agency received three offers, which we find sufficient to satisfy the full and open competition requirement. See *Metro Medical Downtown*, B-220399, Dec. 5, 1985, 85-2 CPD ¶631.

The protest is denied.

[B-223319]

Appropriations—Availability—Refreshments

If an agency determines that a reception with refreshments, as provided in the Federal Personnel Manual, would materially enhance the effectiveness of an awards ceremony conducted under authority of the Government Employees' Incentive Awards Act, the cost of those refreshments may be considered a "necessary expense" for purposes of 5 U.S.C. 4503. As such, the cost may be charged to operating appropriations without regard to "reception and representation" limits. B-114827, Oct. 2, 1974, modified.

Matter of: Refreshments at Awards Ceremony, July 21, 1986:

The Director, Division of Finance, Social Security Administration (SSA), Department of Health and Human Services, has asked whether the cost of refreshments at SSA's annual awards ceremony may be paid from operating appropriations, or whether it is subject to the statutory ceiling on SSA's "official reception and representation" account. Restated, the question is whether there is any legal objection to the Office of Personnel Management's (OPM) statement in the Federal Personnel Manual that "light refreshments" may be provided under the authority of the Government Employees' Incentive Awards Act.[1] We hold that OPM is correct

[1] Federal Personnel Manual, chapter 451, subchapter 2, para. 2-2c (Inst. 265, Aug. 14, 1981). ("[I]t would be appropriate to provide light refreshment at nominal cost under authority of [the Incentive Awards Act].)

and that the expense may be charged to operating appropriations without regard to the "reception and representation" ceiling. In so holding, we welcome the opportunity to clarify an apparent inconsistency in our decisions.

It is explained that each October, SSA holds an awards ceremony at its headquarters in Woodlawn, Maryland, at which various awards are presented to SSA employees from around the nation. The ceremony includes refreshments in the form of a "buffet luncheon." SSA receives its operating appropriations in the form of an annual lump-sum "Limitation on Administrative Expenses" (LAE), SSA's equivalent of a "Salaries and Expenses" appropriation. Typically, a small sum ($5,000 for fiscal year 1986) out of the LAE is made available for "official reception and representation."

It has been established through numerous decisions of this office that, with limited exceptions not relevant here, appropriated funds may not be used to provide free food to Government employees. *E.g.*, 65 Comp. Gen. 16 (1985); 47 Comp. Gen. 657 (1968). The rational behind these decisions is quite simple. Feeding oneself is a personal expense which a Government employee is expected to bear from his or her salary. Thus, free food, classified in some of the decisions under the umbrella term "entertainment," normally cannot be justified as a "necessary expense" under an appropriation. This rule, like most, is premised on the absence of statutory authority to the contrary. The issue here is whether the Incentive Awards Act provides this authority.

The Government Employees' Incentive Awards Act is found at 5 U.S.C. §§ 4501-06. Of relevance here, 5 U.S.C. § 4503 authorizes an agency head to "pay a cash award to, and incur necessary expense for the honorary recognition of" employees who meet general criteria specified in the statute.[2] We have found no legislative history to guide us as to the intended scope of the term "necessary expense" in 5 U.S.C. § 4503. A 1967 congressional review of the implementation of the statute said:

There is very little legislative history concerning the Government Employees' Incentive Awards Act and there was apparently little, if any, controversy over passage of the act in 1954. Since the act was passed, the Congress has given very little guidance for implementation of the legislation except that which is included in the specific language of the act itself.[3]

In B-167835, Nov. 18, 1969, we concluded that the Incentive Awards Act authorized the National Aeronautics and Space Administration to pay for part of the cost of a banquet honoring the

[2] Although the incentive Awards Act does not apply to the uniformed services, somewhat similar authority exists, including the identical "necessary expense" language, in 10 U.S.C. § 1124 with respect to members of the armed forces. Accordingly, this decision applies equally to 10 U.S.C. § 1124.

[3] Report Covering the Effectiveness of Implementation of the Government Employees' Incentive Awards Act, Subcom. on Manpower and Civil Service, House Comm. on [illegible]ice and Civil Service, H.R. Rep. No. 885, 90th Cong., 1st Sess. 7 (1967).

Apollo 11 astronauts, at which the President was to present the Medal of Freedom to the astronauts. However, a 1974 decision (B-114827, Oct. 2, 1974) held that the cost of refreshments at a Federal Home Loan Bank Board awards ceremony was payable from the Board's reception and representation account. While the decision, apart from the first digest, did not explicitly state that the "R&R" account was the only legally available funding source, this seems to have been the clear implication. The 1974 decision did not mention the 1969 case, nor did it address the "necessary expense" language of 5 U.S.C. § 4503.

We have dealt with the concept of "necessary expenses" in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: It is measured not by reference to an expenditure in vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved.

The Incentive Awards Act authorizes each agency to develop an awards program (see 5 U.S.C. § 4506). An awards ceremony is a proper if not integral element of such a program. Clearly the statutory objectives will be better met by presenting an award along with a measure of public recognition, rather than anonymously depositing it in the recipient's in-box. Once we have said this, it becomes apparent that an awards ceremony is different from an agency's typical day-to-day conduct of official business. It is, by its very nature and purpose, for lack of a better term, "ceremonial." It should therefore not stretch the imagination to conclude that certain things—such as refreshments—which would be inappropriate in other contexts, might be appropriate as part of a ceremonial function.

In view of the foregoing, should an agency determine that a reception with refreshments, in accordance with OPM regulations, would materially enhance the effectiveness of its awards ceremony, the cost of those refreshments may be considered a "necessary expense" for purposes of 5 U.S.C. § 4503. As a "necessary expense," the cost may be borne by operating appropriations and need not be charged to a reception and representation account. See 5 U.S.C. § 4502(d).

Our 1974 decision (B-114827, *supra*) was incorrect in two respects. First, it did not consider the 1969 Apollo 11 case, but followed 43 Comp. Gen. 305 (1963), which dealt with persons who were not Federal employees.[4] Second, it failed to give proper weight to

[4] OPM has correctly interpreted 43 Comp. Gen. 305. See article entitled "Payment for Award Receptions" appearing on page 4 of an OPM bulletin entitled "Incentive Award Notes," vol. 32, no. 3 (Jan.-Feb. 1986).

the "necessary expense" language of 5 U.S.C. § 4503. To the exter it is inconsistent with this decision, B-114827, Oct. 2, 1974, hereby modified.[5]

[B-219829]

Appropriations—Fiscal Year—*Bona Fide* Needs for Obligatio

The entire amount of the original cost reimbursement contract between the Vete ans Administration and the contractor for a needs assessment study of Vietnam-er veterans was properly charged to fiscal year 1984 appropriations, the appropriation available when the contract was executed, since the study was a *bona fide* need c fiscal year 1984.

Appropriations—Fiscal Year—Availability Beyond—Contracts—Modification

Modification of a cost reimbursement contract occurring in fiscal year 1985, whic increased the amount of the original contract ceiling price and which did not repre sent an antecedent liability enforceable by the contractor is properly chargeable t appropriations available when the modification was approved by the contracting o ficer; that is, fiscal year 1985 appropriations.

Matter of: Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, July 22, 1986:

A Veterans Administration (VA) certifying officer asks about th proper fiscal year to charge for a cost reimbursement fixed fee con tract between the VA and Research Triangle Institute entered or September 12, 1984, for a national needs assessment study of Viet nam-era veterans. He also asks about the proper fiscal year t charge for a contract modification issued on May 20, 1985 providing for an increase of $218,952 in the contract's cost. For the reasons given below, we find that the full original contract price shoulc have been charged to appropriations for fiscal year 1984, the yea in which the contract was executed. We also conclude, however that the contract modification is properly chargeable to the appro priation available when the modification was approved; that is, tc fiscal year 1985 appropriations, since the amount involved exceeds the original contract ceiling price.

Public Law 98-160, 97 Stat. 993, 994-95 (1983), directed the VA Administrator to "provide for the conduct of a comprehensive study of the prevalence and incidence in the population of Vietnam veterans of post-traumatic stress disorder and other psychological problems in readjusting to civilian life * * *." The Act also direct ed the Administrator to submit to the Senate and House Committees on Veterans' Affairs a report on the results of the study nc later than October 1, 1986. Although the legislative history of Public Law 98-160 contains a fairly detailed discussion of the sub-

[5] We do not "overrule" B-114827 because what we are saying here does not preclude an agency from charging the cost to an applicable "R&R" account if it is so chooses. This decision says merely that charging an "R&R" account is not required.

stance of the study, there is no commentary about how it was intended to be funded.

The VA cost reimbursement contract with the Research Triangle Institute, entered on September 12, 1984, provides that the VA will pay the contractor up to a ceiling contract price of $3,620,024 for a national needs assessment of Vietnam-era veterans. The contract contained a "Limitation of Funds" clause which by reference established an estimated cost ceiling of $3,620,024 and provided that once the ceiling was reached, the contractor would be under no obligation to continue performance unless additional funds were allocated to the contract.

The "Statement of Work" describing what is to be done under the contract is quite detailed. Among other things, it establishes a time schedule for the 42 weeks necessary to complete the final report. The Statement provides for progress and other preliminary and interim reports at one month intervals during the first 6 months, and subsequently at 3-month intervals. The Statement makes it clear that the study must meet the requirements of the cited legislation.

After the contract award, the contracting officer issued a series of change orders for additional work under the "changes" clause of the contract. Modification numbers three and five each required obligation of additional funds. Modification number five, the modification mentioned specifically by the certifying officer, modifies the contract to include expanded requirements for the "Pretest" phase. The Statement of Work describes the Pretest in some detail and schedules it for the 10th month of work. This modification increased the contract ceiling amount by $218,952.

Although neither the VA appropriations acts nor their legislative histories mention the study, we have been informed that, thus far, the contract has been financed from the lump-sum appropriation for "Medical Care" in the fiscal year 1984 appropriations act covering the VA. Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1984, Pub. L. No. 98-45, 97 Stat. 219, 233. This is a 1-year appropriation.

The record suggests that there is a conflict between the VA certifying officer requesting this decision and the VA's Office of General Counsel. The certifying officer maintains that as the contract will take several years to complete, it resembles a continuous service or multi-year contract. In this sense he says it is severable, and application of the *bona fide* need rule would prohibit use of fiscal year 1984 monies to fund the entire contract. Thus, he concludes, the contract should be obligated over the period 1984 through 1988, the period of time described in the "Statement of Work" during which the contract work will be performed. On the other hand, the Office of General Counsel has concluded that the contract is not severable and its entire cost should be funded from fiscal year 1984 funds. The Office of General Counsel also has concluded that the

contract modification in question was within the scope of the original contract and therefore the increase in costs should be charged to fiscal year 1984 funds.

Proper Appropriation to Charge for Original Contract

It is well settled that without express statutory authority, no agency may obligate an appropriation made for the needs of a limited period of time, such as a fiscal year, for the needs of subsequent years. 64 Comp. Gen. 359, 362 (1985). This is a paraphrase of the *bona fide* need rule, which makes appropriations available only to fill a *bona fide* need which exists at the time a contract is executed. *See* 31 U.S.C. § 1502(a).

Consistent with this rule, we have held that delivery of goods or performance of services in a fiscal year subsequent to the year in which a contract is executed does not preclude charging of earlier fiscal year appropriations with the full cost of the goods or services. The test is whether the goods or services are intended to meet an immediate need of the agency, regardless of when the work under the contract is completed. 60 Comp. Gen. 219, 220 (1981). On the other hand, continuing and recurring services, to the extent the need for a specific portion of them arises in a subsequent fiscal year, do not meet the test. The portion of the services needed in the subsequent fiscal year would be considered "severable" and chargeable to appropriations available in the subsequent year pursuant to a contractual commitment made in that year. *Id.* at 221.

Applying these principles here, we conclude that the entire contract was a *bona fide* need of fiscal year 1984. The service to be provided—that is, preparation of a study on the adjustment needs of Vietnam-era veterans—is to meet an immediate agency need mandated by statute. The fact that the study will not be completed until fiscal year 1988 does not alter this conclusion. This situation is somewhat analogous to contracts for construction of buildings, or other long lead-time items, which are begun in one year, but which may take several years to complete. These contracts usually are considered *bona fide* needs of the year in which the contract is executed, not the year in which the work is completed, *see id.* at 220-21.

We do not think the service contracted for here is severable. The service is to complete the study and to provide a final report to the Congress, nothing less. Although the "Statement of Work" obligates the contractor to provide various interim reports on how the work is progressing, these reports are merely informational and cannot be considered work products that are independent of the study. Furthermore, unlike the National Institutes of Health research grants considered in 64 Comp. Gen. 359, 362-65 (1985), which we suggested were severable since they did not contemplate a required outcome or product, the work here is for a particular

product; that is, the study mandated by Congress. Accordingly, we conclude that the entire original contract amount was properly charged to fiscal year 1984 monies.

Proper Appropriation to Charge for Contract Modification

Consistent with the *bona fide* need rule, in the past we generally have held that where fulfillment of a contract made in an earlier fiscal year required increases in cost in later years, the increased costs were to be charged to the appropriation funding the original contract. This was so because the Government's obligation under the subsequent price adjustment was to fulfill a *bona fide* need of the original fiscal year.[1] *See* 59 Comp. Gen. 518, 521-22 (1980); 44 Comp. Gen. 399, 401-02 (1965). In 61 Comp. Gen. 609 (1982), however, we modified this position somewhat, concluding that amounts for increases in cost reimbursement contracts that exceed the original contract ceiling price, and which are not based on an antecedent liability enforceable by the contractor, may be charged to funds available when a contract price increase is granted by the contracting officer. 61 Comp. Gen. at 612. We reasoned that although an agency must reserve funds up to the contract's ceiling to comply with the Antideficiency Act's prohibition against incurring obligations exceeding available appropriations, 31 U.S.C. § 1341(a)(1), it is neither required to reserve amounts for cost increases beyond the estimated ceiling nor, in most cases, is it practical to predict the amount of such increases at the time the contract is executed.

In this instance, modification number five was approved in May 1985. The modification increased the original contract amount by $218,952. Although the modification was based on the original contract—expanding the "Pretest" described in the contract's "Statement of Work"—the increases did not involve an antecedent liability enforceable by the contractor. Since this increase is above the contract ceiling price, we find that it is properly chargeable to appropriations available when the increase was granted by the contracting officer; that is, the 1985 fiscal year appropriation. Similar modifications may be treated accordingly.

[B-222440]

Contracts—Protests—Authority to Consider—Tennessee Valley Authority Procurements

Tennessee Valley Authority (TVA) is subject to the bid protest jurisdiction of the General Accounting Office under the Competition in Contracting Act of 1984 (CICA) since TVA comes within the statutory definition of a federal agency subject to CICA.

[1] We had differentiated, however, new contract liabilities from those which were based on the original contract, holding that the former should be paid from the appropriation available when the new liability was incurred rather than when the original contract was executed. *See* 55 Comp. Gen. 768 (1976).

Bids—Evaluation—Foreign Country End Products

For purpose of applying a statutorily-prescribed differential in the evaluation of bids offering foreign-manufactured "extra high voltage power equipment," Tennessee Valley Authority erred in adopting a definition of that term recited in the statement of the conference managers accompanying the conference committee report on the legislation where the managers' statement indicates they intended to repeat the definition used by the Department of Commerce but erroneously understood it.

Matter of: SMIT Transformatoren B.V., July 28, 1986:

SMIT Transformatoren B.V. (SMIT) protests invitation for bids (IFB) No. HA-458028 issued by the Tennessee Valley Authority (TVA) for the procurement of power transformers and certain other accompanying equipment, with an option for an additional procurement of the same type and quantity of items. SMIT protests TVA's cancellation of the IFB initially issued for this procurement and the inclusion of a Buy American differential in the IFB readvertising the subject procurement. We sustain the protest.

On December 13, 1985, TVA issued the IFB for two 161-kV (kilovolts) main power transformers with the option to purchase certain additional units. SMIT states that it was the low responsive bidder at the time of bid opening on February 4, 1986. On February 21, 1986, TVA issued a notice of its rejection of all bids and cancellation of the solicitation. The notice stated that the requirement would be:

> . . . readvertised using a 25-percent Buy American differential provided by section 506 of Public Law 99-141 in lieu of the differentials provided in this invitation to bid.

The solicitation was reissued on March 12, 1986, with a bid opening scheduled for April 2, 1986. As reissued, the solicitation contained the following clause:

> ADDITIONAL EVALUATION FACTOR AFFECTING FOREIGN EHV POWER EQUIPMENT
>
> Public Law No. 99-141 requires that TVA award any contract for EHV [extra high voltage] power equipment to a domestic manufacturer if TVA determines that such domestic EHV power equipment meets TVA's technical requirements at a price not exceeding 125 percent of the bid or offering price of the most competitive bidder. In addition to any other evaluation factor specified in this invitation, the following evaluation factor applies to bids of bidders offering foreign-manufactured extra high voltage (EHV) power equipment.
>
> a. If domestic and foreign manufacturers of EHV power equipment meet TVA's technical requirements, then, for evaluation purposes only, the bid price of foreign bidders will be increased by 25 percent (adjusted foreign evaluation price).
>
> b. As provided in Conference Report No. 99-307 o[f] Public Law 99-141, this provision applies to transformers rated above 10,000 kVA; . . .

SMIT timely protested the solicitation as reissued, stating that as a result of the inclusion of this requirement in the solicitation an additional 25-percent evaluation factor—more than double the foreign product differential in the solicitation as initially issued—is added to its bid and it is no longer the low bidder. The protester maintains that TVA's inclusion of the differential required by Public Law [illegible] in the solicitation was improper because the Buy

American provision does not apply with respect to the transformers and other equipment here being procured, which SMIT contends is not EHV equipment. The protester thus maintains that the solicitation should be reinstated as it was initially issued and that the contract should be awarded to SMIT as the low, responsive bidder.

In response to SMIT's protest, TVA initially challenges our jurisdiction to decide this protest under the authority of the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3551, *et seq.* (Supp. II 1984).

In previous post-CICA decisions, we have considered and rejected TVA's challenges to our jurisdiction under CICA to decide bid protests of its procurement activities. In those cases, we concluded that since, under the provisions of 31 U.S.C. § 3551(3), our bid protest authority extends to "federal agencies" as that term is defined in the section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. § 472 (1982)), and TVA, as a wholly owned government corporation, is a federal agency within that definition, it is subject to our bid protest jurisdiction. *Monarch Water Systems, Inc.*, 64 Comp. Gen. 756 (1985), 85-2 C.P.D. ¶ 146; *Newport News Industrials Corp.; Simulation Associates, Inc.*, B-220364, Dec. 23, 1985, 85-2 C.P.D. ¶ 705.

The statutory provision which is the subject of this protest is section 506 of Pub. L. No. 99-141, 99 Stat. 579 (1985), the Appropriations Act for energy and water development for fiscal year 1986, which states:

> No funds appropriated in this Act may be used to pay the salary of the Administrator of a Power Marketing Administration or the Board of Directors of the Tennessee Valley Authority unless they award contracts for the procurement of extra high voltage power equipment manufactured in the United States when such agency determines that there are one or more domestic manufacturers offering a product which meets the technical requirements of such agency at a price not exceeding 125 per centum of the bid or offering price of the most competitive foreign bidder. . . . This section shall not apply to any procurement initiated before its effective date or to the acquisition of spare parts.

The term "extra high voltage power equipment" is not defined in the statute or in the report of the House Committee on Appropriations on H.R. 2959 (H.R. Rep. No. 99-195, 99th Cong., 1st Sess. (1985)) or in the report on the bill the Senate Committee on Appropriations (S. Rep. No. 99-110, 99th Cong. 1st Sess. (1985)). The term is discussed in the statement of the conference managers accompanying the conference committee report on H.R. 2959, which states in relevant part:

> Language has been included regarding the procurement of extra high voltage (EHV) power equipment by . . . the Tennessee Valley Authority. *As defined by the Department of Commerce,* the EHV power equipment industry includes, but is not limited to, transformers rated above 10,000 kVA . . . [1] H.R. Rep. No. 99-307, 99th Cong., 1st Sess. 63 (1985). [Italic supplied.]

SMIT contends that TVA should not have included this increased Buy American differential in a solicitation for 161 kilovolt main power transformers on the grounds that the definition recited in the conference report is inconsistent with industry standards which define EHV power equipment as having a minimum voltage of 242 kilovolts and that it has been informed by the Commerce Department that the conference committee mistakenly used statistical information provided by the Commerce Department to arrive at an erroneous definition of EHV power equipment and, therefore, that the definition accompanying the conference report is incorrect. The protester further notes that the conference report definition is inconsistent with the following statement concerning section 506 made by the chairman of the Senate Committee on Appropriations during the Senate's consideration of the conference report:

> * * * the conference managers included as report language what they believed was a Commerce Department definition for EHV power equipment in order to clarify the scope of equipment to be covered by this amendment. The Department of Commerce now indicates that this is not its definition of EHV power equipment. To eliminate potential confusion, I believe it is prudent to limit the scope of the amendment to the type of EHV power equipment referred to in House Report 99-195. Based on the House report and the American National Standards Institute definition of EHV [extra high voltage] power equipment is alternating current [AC] and direct current [DC] electrical equipment rated and operating above 242 kilovolts and less than 1,000 kilovolts. 131 Cong. Rec. 13448 (daily ed. Oct. 17, 1985) (statement of Senator Hatfield).[2]

In its initial protest, SMIT contended that the definition of EHV power equipment applied by TVA to this procurement is contrary to the accepted understanding of the industry, as evidenced by the fact that the three leading trade groups in the field—the American National Standards Institute (ANSI), the Institute of Electrical and Electronics Engineers (IEEE), and the National Electrical Manufacturers Association—all adopt a minimum voltage of 242 kV, above that of the equipment purchased here. In addition, the protester asserted that it had been informed by the Department of Commerce employee who provided the statistical information to the conference committee that the conference mistakenly used that information to arrive at an erroneous definition of EHV power equipment; that (as indicated by Senator Hatfield's statement) the Department of Commerce in fact employs the ANSI definition which encompasses equipment having a rating greater than 242 kV; and that the Senate conferees were notified of the error appearing in the statement of the conference committee managers accompanying the conference report.

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[1] The parties do not dispute that the 161-kV transformers here being purchased are rated above 10,000 kVA; they do disagree as to whether this is the proper definition of EHV power equipment to be applied.

[2] Senator Johnston concurred in Senator Hatfield's comments.

None of this was addressed, much less disputed, in TVA's report submitted to our Office in response to the protest. Rather, TVA defends its position solely on the basis of the definition contained in the conference managers' statement which, it maintains, as a matter of statutory construction must take precedence over the statement of the Senate committee chairman made on the floor of one House.

We understand the argument TVA has made but think its approach is too narrow. The purpose of the statute was to protect domestic industry by prescribing the application of a price differential in the evaluation of bids offering foreign "extra high voltage power equipment," a term the drafters evidently thought did not require definition within the statute itself. A definition does appear in the conference managers' statement accompanying the conference committee report but, as we read that statement, the conference managers did not attempt to define what the conferees meant by EHV power equipment but to recite their understanding of that term "[a]s defined by the Department of Commerce."

The protester asserts that the conference managers misunderstood statistical information provided to them by the Department of Commerce and as a result erroneously recited a definition which was at odds with that accepted in the industry and employed by the Department of Commerce itself. We have no reason to believe that the conference managers set out to do any more than to convey a correct, established, definition of EHV equipment. In the absence of any rebuttal by TVA of the protester's assertion that the equipment here being purchased falls below the industry's definition of EHV power equipment, a position corroborated by the IEEE Standard Dictionary of Electrical and Electronics Terms (Second Edition), we do not think the conference managers' erroneous perception should be controlling.

We therefore sustain the protest. It follows that TVA's cancellation of the original solicitation and readvertisement under a more stringent evaluation criterion was in error. The second solicitation should be canceled and the first reinstated and award made consistent with its terms on the basis of the bids received as of February 4, 1986.[3]

[3] TVA apparently disagrees with SMIT as to whether that firm is the low bidder on both lots of equipment under the original solicitation. No final determination of the awardee, or awardees, was made in view of the subsequent cancellation of that solicitation and the present record, therefore, is not sufficiently complete for us to resolve the issue.

[B-222053]

Officers and Employees—Transfers—Miscellaneous Expenses—Mobile Home Dwelling Purchase, etc.

Subject to the statutory limitation on reimbursement, an employee who transported her double-wide mobile home to her new duty station is entitled to a miscellaneous expense allowance to cover costs of disassembling the mobile home in preparation for shipment and of reassembling and blocking the mobile home at the new residence site. The allowance also covers nonreimbursable deposits for propane gas service and fees for connecting that and other utilities. While the allowance covers state-imposed charges for titling and registration at the new duty station, it does not cover the cost of parts and labor to install wheels and axles necessary to prepare the mobile home for shipment since these were newly acquired items.

Matter of: Katherine I. Tang, July 29, 1986:

Ms. Katherine I. Tang, and employee of the Federal Bureau of Investigation (FBI), has filed a reclaim voucher seeking reimbursement for expenses she incurred in relocating her mobile home incident to her transfer from Jacksonville, Florida, to Columbus, Ohio.[1] Subject to the statutory limitation on reimbursement of miscellaneous expenses, we hold that Ms. Tang is entitled to reimbursement for all but the expenses claimed for installing wheels and axles necessary to transport the mobile home to her new duty station.

Upon being notified of her impending transfer, Ms. Tang indicates she contacted an official within the transportation unit of the FBI who told her she could move her double-wide mobile home at Government expense. After reporting to her new duty station on January 22, 1984, Ms. Tang submitted a travel voucher claiming the expenses she incurred in relocating her mobile home. Although the cost of transporting the mobile home was approved, the FBI disapproved most of the costs associated with disassembly and preparation of the mobile home for shipment and with reassembly and hookup at the new residence site. The FBI disallowed these expenses on the basis that para. 2-7.3 of the Federal Travel Regulations (Supp. 1, Sept. 28, 1981), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1983), specifies that the allowance for transportation of a mobile home does not include "costs of preparing mobile homes for movement, maintenance, repairs * * *." The FBI allowed reimbursement for an anchor and tie-down fee of $80 and a charge of $220.48 to reconnect the mobile home's heating and air conditioning units, as well as shipment and freight charges.

Following the initial denial of her claim Ms. Tang submitted a reclaim voucher in which she sought reimbursement of the expenses which had been disallowed by the agency. It is that reclaim voucher which has been submitted for our determination.

[1] The matter was presented for an advance decision by Mr. John H. Skaggs, Authorized Certifying Officer, of the FBI.

Ms. Tang claims that she should be reimbursed all the expenses she incurred in preparing, shipping, and reassembling her mobile home because she was advised by an agency transportation official that the costs associated with relocating her mobile home from Jacksonville to Columbus would be borne by the Government. She claims that she was never informed that this would not include costs of preparing the home for shipment and reassembling it after delivery. Also, Ms. Tang argues that the Federal Travel Regulations discriminate against mobile home owners who must bear most of the expenses associated with taking apart and setting up a mobile home whereas employees who move between conventional homes are entitled to reimbursement for real estate sale and purchase expenses that may be substantially greater.

A transferred employee who chooses to relocate his mobile home to his new duty station, in fact, may be reimbursed for all or part of the cost of preparing his mobile home for shipment and of reassembling the mobile home at the new location. Reimbursement is not allowed as a cost of transportation but as an item of miscellaneous expense under the conditions and limitations prescribed in Chapter 2, Part 3 of the Federal Travel Regulations (Supp. 4, August 23, 1982), *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1983). *Wanda J. Campbell,* B-208991, February 8, 1983. Consistent with the statutory limitation imposed by 5 U.S.C. § 5724a(b)(2), FTR, para. 2-3.3 provides that an employee without immediate family who submits receipts or other acceptable documentation may be reimbursed for miscellaneous expenses in an amount not to exceed 1 week's basic pay up to the maximum for a grade GS-13. Subparagraph 2-3.1b(2) specifically lists as a cost covered by the miscellaneous expenses allowance "fees for unblocking and blocking and related expenses in connection with relocating a mobile home."

The items for which Ms. Tang has claimed reimbursement are as follows:

1. Fee for new drivers license	$6.50
2. Telephone installation	81.39
3. Parts and labor to install a propane gas tank	111.60
4. Parts and labor for new wheels and axles to transport mobile home	659.40
5. Materials and labor to separate double-wide trailer	1,153.14
6. Concrete blocks to set up home	81.99
7. Reassembling home including utility hookups	775.00
8. Transfer tax	149.00
Total	$3,318.50

For each claimed expense, except the last, Ms. Tang has provided a receipt.

The agency has not specifically questioned the $6.50 driver's license fee or the $81.39 telephone installation charge. Both are reimbursable as items of miscellaneous expense under FTR, para. 2-3.1 which lists costs of driver's licenses and utility connection fees as allowable items of expense. *George M. Lightner,* B-184908, May 26, 1976, and *Prescott A. Berry,* 60 Comp. Gen. 285 (1981).

The third item of expense claimed by Ms. Tang is a $111.60 charge by the Ohio Gas and Appliance Company which includes a nonrefundable deposit of $79.95 for a 250 gallon propane gas tank and a fee of $31.65 for materials and labor to connect the tank. Under FTR, para. 2-3.1, utility fees and deposits not offset by eventual refund as well as fees for connecting utilities may be reimbursed as items of miscellaneous expense. The nonrefundable deposit incurred by Ms. Tang for the propane tank serves a purpose similar to the deposit charged for electric or gas utility service and, therefore, may be reimbursed. See *Woodrow W. Williams, Jr.,* B-190209, July 13, 1978. In *Duane C. Hollan,* B-206426, May 24, 1982, we held that expenses, including parts, necessary to connect a mobile home to available utilities may be reimbursed as items of miscellaneous expense. In accordance with this decision, the charge of $31.60 for labor and materials to connect the propane tank to the heating system in Ms. Tang's mobile home also may be reimbursed.

The fourth item claimed by Ms. Tang is a charge of $659.40 for parts and labor to install axles and wheels necessary to transport the two halves of her double-wide mobile home from Florida to Ohio. We have held that the cost of tires necessary to prepare a mobile home for transportation to the new duty station may not be reimbursed as a miscellaneous expense in view of the language of FTR, para. 2-3.1(c) which specifically excludes costs for newly acquired items. *Fred T. Larsen,* B-186711, January 21, 1978. Because this holding would apply, as well, to costs incurred in equipping the mobile home with axles, the charge of $659.40 is disallowed in its entirety.

The fifth, sixth and seventh items claimed are costs incurred for the purpose of separating Ms. Tang's double-wide mobile home into two sections for shipment and for reassembling those halves, affixing them to the new residence site and connecting the utilities. Under FTR, para. 2-3.1a, costs of unblocking and blocking and related expenses incurred in relocating a mobile home are listed as items which are covered by the miscellaneous expenses allowance. Under this authority, we have allowed reimbursement for the cost of blocks purchased for the purpose of blocking the mobile home at the new residence site. *Edelmiro Amaya,* B-201645, December 4, [illegible] As a cost related to unblocking a double-wide mobile home, [illegible] held that the cost of separating an oversized mobile home

into two sections for shipment may be reimbursed as a miscellaneous expense. B-168109, November 14, 1969. For the same reason, the cost of reassembling the two halves at the new residence site would be reimbursable as a cost related to blocking the residence at the new site. B-166247, March 13, 1969. And, as indicated previously, costs incurred in connecting utilities are specifically covered by the miscellaneous expense allowance. Thus, items 5, 6 and 7 are all allowable costs. *Fred T. Larsen,* B-186711, *supra,* and *Edelmiro Amaya,* B-201645, *supra.*

The last item claimed by Ms. Tang is a $149 fee described on her voucher as a fee to transfer title and register her mobile home in Ohio. Ms. Tang has not submitted a receipt or otherwise documented her payment or the nature of this fee. Subject to the requirement for appropriate documentation, a state-imposed fee of this type would appear to be reimbursable as an item of miscellaneous expense. 47 Comp. Gen. 687 (1968).

If Ms. Tang furnishes documentation to support allowance of the $149 title and registration fee, she will have established that she incurred miscellaneous expenses totaling $2,659.10. This total includes the allowable items discussed above together with expenses of $300.48 already reimbursed by the FBI. As noted above, the amount Ms. Tang may be reimbursed under the miscellaneous expenses allowance is limited by law to 1 week's basic pay, up to the maximum for GS-13. We have not been furnished information concerning Ms. Tang's rate of pay and, therefore, leave the application of this limitation to her agency.

We cannot agree with Ms. Tang's contention that she should be reimbursed for all the costs she incurred in relocating her mobile home because she was given erroneous advice. Employees may receive only those relocation benefits or entitlements that are authorized by law and implementing regulations and an agency's erroneous information may not serve as a basis for establishing an entitlement not authorized by law. See, e.g., *James A. Schultz,* 59 Comp. Gen. 28, 30-31 (1979); *Eugene B. Roche,* B-205041, May 28, 1982.

Lastly, as to Ms. Tang's contention that the Federal Travel Regulations discriminate against mobile home owners, the Federal Travel Regulations are statutory regulations implementing the basic statutory entitlements for transferred employees. While the expenses associated with the sale and purchase of a residence by a transferred employee are made reimbursable by the specific language of 5 U.S.C. § 5724a(a)(4) (Supp. 1, 1983), there is no specific statutory provision allowing for the reimbursement of the expenses associated with preparing a mobile home for shipment and the subsequent reassembling of the home. Consequently, the expenses of preparing and reassembling may only be made under the statutory provision for reimbursement of miscellaneous expenses which is limited to a maximum reimbursement of 1 week's pay for an employee without immediate family. See 5 U.S.C. § 5724a(b). Moreover, an employee who sells a mobile home at his old duty station and purchases a mobile home at his new duty station is entitled to real estate sale and purchase expenses to the same extent as if he had bought and sold any other type of residence. See FTR, para. 2-6.1b.

Accordingly, within the limitations discussed, Ms. Tang may be reimbursed for all of the miscellaneous expenses claimed, with the exception of the charge of $659.40 for tires and axles.

[B-217050]

Severance pay statute, 5 U.S.C. 5595, is intended to provide a cushion for federal employees who are unexpectedly terminated from their positions, but not for those employees who had an expectation of separation at the time of their appointments. Consistent with this intent, a regulation, 5 C.F.R. 550.704(b)(4)(iii), which denies severance pay to employees of agencies scheduled to expire within 5 years of the employee's date of appointment is valid as applied to agencies which perform an inherently temporary mission and have not been extended. However, the regulation cannot properly be applied to the United States Commission on Civil Rights, which, while literally covered by the regulation, had been in continuous existence for over 20 years at the time the employees seeking severance pay were appointed. Such employees are within the zone of protection intended by the statute since they cannot reasonably be viewed as having an expectation of separation at the time they were appointed. *Frances (Goldberg) Zucker,* B-188819, February 8, 1978, distinguished.

Matter of: Sylvia J. Eastman and Ann H. Meadows—Severance Pay—Temporary Agencies, July 30, 1986:

This decision is in response to claims for severance pay submitted to our Claims Group by two former employees of the United States Commission on Civil Rights, Ms. Sylvia J. Eastman and Ms. Anne H. Meadows. For the reasons stated hereafter, we conclude that the claimants are eligible for severance pay.

BACKGROUND

On November 16, 1983, Ms. Eastman and Ms. Meadows resigned from their position with the Civil Rights Commission, "in lieu of other involuntary action," incident to the projected expiration and shut-down of the Commission on November 30, 1983. At the time of their resignations, Ms. Eastman had served with the Commission for 4 years and 9 months and Ms. Meadows has served for 4 years and 1 month.

Shortly before their resignations they had been informally advised of their entitlement to severance pay. On November 23, 1983, however, they were officially informed that they were ineligible for severance pay because of 5 C.F.R. § 550.704(b)(4)(iii). This regulation precludes severance pay for employees of agencies which are scheduled to terminate within 5 years of the date of the employee's appointment and which have not been extended beyond 5 years of such date by the time of the employee's separation.

Among their other contentions, the claimants assert that the regulation is illegal because it imposes a condition upon eligibility for severance pay beyond those set forth in or contemplated by the severance pay statute. In the alternative, they maintain that the regulation is inapplicable to the Civil Rights Commission, which had been in continuous existence for well over 20 years at the time of their resignations, by virtue of a series of congressional reauthorizations. Their argument on this point is that the regulation was designed to make employees of certain temporary agencies ineligible for severance pay but that the Civil Rights Commission cannot reasonably be considered a temporary agency for this purpose.

DECISION

Consistent with a prior decision of our Office, we believe that the severance pay statute affords sufficient administrative discretion to support a regulation which excludes from severance pay coverage employees of clearly temporary agencies. Nevertheless, we agree with the claimants that the Civil Rights Commission is not such an agency and, therefore, the regulation cannot properly be applied to the Commission.

The statute governing severance pay is 5 U.S.C. § 5595 (1982). Subsection 5595(b) provides:

> Under regulations prescribed by the President or such office or agency as he may designate, an employee who—
>
> (1) has been employed currently for a continous period of at least 12 months; and
>
> (2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency;
>
> is entitled to be paid severance pay in regular pay periods by the agency from which separated.

While the term "employee" is defined generally in subsection 5595(a)(2) to mean an individual who is employed in or under an agency, this subsection goes on to qualify the definition of "employee" by excluding a number of classes of individuals from coverage. One of these exclusions is 5 U.S.C. § 5595(a)(2)(ii), which provides that the definition of "employee" does not include:

> * * * an employee serving under an appointment with a definite time limitation, except one so appointed for full-time employment without a break in service of more than 3 days following service under an appointment without time limitation * * *.

The President delegated to the Civil Service Commission, now the Office of Personnel Management (OPM), authority to prescribe regulations implementing 5 U.S.C. § 5595. One provision of these implementing regulations, and the provision at issue here, is 5 C.F.R. § 550.704(b)(4)(iii) (1986),[1] which states:

> An employee is considered to be serving under an appointment with a definite time limitation for purposes of section 5595(a)(2)(ii) of [title 5] when (a) he accepts an appointment without time limitation in an agency which is scheduled by law or Executive order to be terminated within 5 years of the date of his appointment, and (b) the scheduled date of termination for the agency has not been extended beyond 5 years of the date of appointment at the time of the employee's separation.

[1] The language of this provision has remained unchanged at all times relevant to the present case.

As noted previously, the claimants in the present case first contend that the above-quoted regulation is illegal because it imposes an unauthorized condition on eligibility for severance pay. They maintain that while 5 U.S.C. § 5595(a)(2)(ii) limits severance pay coverage for temporary employees, it affords no basis to exclude permanent employees of temporary agencies.

We considered this issue in our decision *Frances (Goldberg) Zucker,* B-188819, February 8, 1978, and sustained the legality of 5 C.F.R. § 550.704(b)(4)(iii). The *Zucker* decision addressed a claim for severance pay by an employee of the American Revolution Bicentennial Administration. Our decision quoted from and relied heavily upon a justification for the regulation provided by the Director of the then Civil Service Commission as follows:

> Severance pay is viewed as a cushion for employees *unexpectedly* terminated from their positions because of changing program demands or increases in efficiency resulting in reduced need for the employees' services. When Congress passed PL 89-201 authorizing severance pay, they provided that certain employees, among them employees serving in appointments with a definite time limitation, would not be eligible for severance pay because at the time of appointment there was an expectation of separation. Under its delegated authority, and in line with the intent of the law, the Commission expanded this concept to exclude from eligibility for severance pay those employees who accepted appointment in an agency which was scheduled to terminate within five years from the date of the employee's appointment (5 C.F.R. § 550.704(b)(4)(iii)). In approving this change in the severance pay regulation it was noted at the time that in substance there is no difference between an employee accepting an appointment under such circumstances in an agency with a definite termination date and an employee accepting an appointment with a definite time limitation—both employees know when they accept their appointment that they will be separated by a certain date. (Emphasis in original.)

In *Zucker* we found no reason to disagree with the justification for 5 C.F.R. § 550.704(b)(4)(iii) advanced by the Civil Service Commission. We pointed out in the context of the facts of that case:

> At the time the employee accepted an appointment with ARBA [the American Revolution Bicentennial Administration], April 21, 1975, the activity had a termination date established by statute of less than 5 years, June 30, 1977. *The very nature of the ARBA connoted an activity with a limited function and life span. Since the employee was aware at the time of her appointment of the temporary nature of the activity, separation should not be unexpected.* The fact that separation may occur sooner than anticipated or that the employee may not have been informed of her ineligibility for severance pay, does not change the requirement of the law and regulation. * * *
>
> * * * To authorize severance pay in such a case would violate the spirit of the law and the regulation that severance pay be provided only for employees who are terminated unexpectedly, and would negate the intent of Congress in excepting employees with appointments of limited duration from the provisions of the law. [Italic supplied.]

The Civil Service Commission's justification for 5 C.F.R. § 550.704(b)(4)(iii) and our acceptance of that justification in *Zucker* thus are based on the rationale that employees of certain temporary agencies, as defined in the regulation, have an "expectation of separation." Therefore, their status is analogous to temporary employees who were excluded by 5 U.S.C. § 5595(a)(2)(ii) from coverage

based on a congressional intent to provide severance pay as a cushion only for employees suffering unexpected termination.

As we held in *Zucker*, this rationale is reasonable in the case of an agency such as the American Revolution Bicentennial Administration which had an inherently temporary mission, performed that mission, and then ceased to exist. But can it be sustained in the case of the Civil Rights Commission, which does not have an inherently temporary mission and which has been extended by Congress many times?

The Commission was originally established by Part I of the Civil Rights Act of 1957, Pub. L. No. 85-315 (September 9, 1957), 71 Stat. 634. Section 104 of the Act, 71 Stat. 635, charged the Commission with (1) investigating allegations that United States citizens were being denied the right to vote by reason of their color, race, religion or national origin; (2) studying and collecting information concerning legal developments constituting a denial of equal protection; and (3) appraising federal laws and policies with respect to equal protection. Section 104 of the 1957 Act required the Commission to submit a final report not later than 2 years from the date of enactment of that Act, and further provided that the Commission "shall cease to exist" 60 days after the submission of its final report.

Congress amended the Commission's statutory charter a number of times after 1957. These amendments not only consistently extended the Commission's life but also expanded its functions on several occasions.[2] When the claimants in this case were hired by the Commission, it had been in continuous existence for about 22 years, having been extended by Congress 7 times (1959, 1961, 1963, 1964, 1967, 1972 and 1978). Section 104 of the Act, as amended in 1978, required the Commission to submit its final report by the last day of the fiscal year ending on September 30, 1983, and provided that the Commission would cease to exist 60 days after that date. See 42 U.S.C. § 1975c(c) and (d) (1982).[3]

The claimants in this case are covered by the literal terms of 5 C.F.R. § 550.704(b)(4)(iii) since, at the time they accepted their appointments, the Civil Rights Commission was scheduled to terminate within 5 years and since the Commission was not extended beyond 5 years of that date at the time the claimants left. Given the background of the Commission as discussed above, however, the real issue is whether this regulation may be applied to the Commission consistent with the purpose and intent of the severance

[2] See generally 42 U.S.C. § 1975c (1982) and the notes of amendments following it for a summary of the evolution of section 104 of the 1957 Act.

[3] On November 30, 1983, the "United States Commission on Civil Rights Act of 1983" was enacted. Pub. L. No. 98-183 (November 30, 1983), 97 Stat. 1301, 42 U.S.C. §§ 1975-1975f (Supp. II, 1984). This Act reconstituted the Commission with a 6-year life span. Section 6 of the Act, U.S.C. § 1975d(a)(2) (Supp. II, 1984), preserved the status and continuity of service of Commission employees, with the exception of the former staff director and former Commission members.

pay statute. As the Claims Court observed in a recent decision addressing the severance pay statute:

> * * * the long-standing consistent interpretation of a statute manifested by regulations promulgated by the agency charged with implementing it is due significant deference. * * * But this axiom is tempered by the admonition that a regulation which is clearly incompatible with the statute under which it was ostensibly promulgated must give way. * * * *Sullivan* v. *United States*, 4 Ct. Cl. 70, 73 (1983), *aff'd*, 742 F.2d 628 (Fed. Cir. 1984).

We sought the views of OPM on this issue, but we were unable to obtain a response. Given the absence of any elaboration by OPM, we must decide the issue based on the rationale for the regulation provided to us in connection with the *Zucker* decision. In this regard, we do not think it is plausible to treat the claimants in this case as having an expectation of separation at the time they joined the Civil Rights Commission. Instead, the background and evolution of the Commission require a conclusion that the claimants reasonably could have expected the Commission's authorization to be extended beyond its termination date at the time of their appointments. Thus, we believe that they are within the category of employees which Congress intended to protect under the severance pay statute.

Absent a response from OPM to our inquiry, we do not know whether OPM would apply 5 C.F.R. § 550.704(b)(4)(iii) to the Civil Rights Commission and, if so, how it would justify that result in terms of its stated rationale for the regulation or the intent of the severance pay statute. In any event, without a compelling justification by OPM, we must hold that 5 C.F.R. § 550.704(b)(4)(iii) cannot be applied to divest the claimants here a severance pay. Accordingly, their claims should be grant if otherwise correct.

[B-221559.2]

Contracts—Protests—General Accounting Office Procedures—Reconsideration Requests—Error of Fact or Law—Not Established

Prior decision is affirmed where new information relied on in request for reconsideration provides no valid basis for modifying or overruling the prior decision.

Bids—Invitation for Bids—Specifications—Minimum Needs Requirement—Administrative Determination—Reasonableness

The fact that only one responsive bid was received from a firm within the area covered by a solicitation's geographic restriction does not demonstrate that the agency was not justified in imposing the restriction to begin with, as the reasonableness of the decision to impose the restriction must be determined on the basis of the information available at the time the decision was made. Further, the procurement was not a sole source acquisition since the agency solicited nine firms within the geographic [illegible] stricted area that could potentially meet its needs, and although only one re[illegible]id was received, it is clear that other facilities within the restricted area c[illegible] the agency's requirements.

Matter of: Treadway Inn—Request for Reconsideration, July 31, 1986:

Treadway Inn requests reconsideration of our decision denying its protest under invitation for bids (IFB) No. DAKF27-86-B-1000 issued by the Department of the Army. The IFB solicited bids to provide lodging and meals to military applicants being processed at the Military Entrance Processing Station (MEPS) in Wilkes-Barre, Pennsylvania.

Treadway, the incumbent contractor, protested an IFB provision restricting the competition to bidders having facilities within five miles of the MEPS. We denied that protest after concluding that the geographic restriction did not unduly restrict competition since the agency reasonably believed that it would improve efficiency and that adequate competition was available within the restricted area. *Treadway Inn,* B-221559, Mar. 10, 1986, 86-1 CPD ¶ 236.

We affirm our prior decision.

Treadway states that after we issued our original decision on its protest, it learned that the government's lease on the facilities occupied by the MEPS in Wilkes-Barre will expire on October 31, 1986, at which time the MEPS will be moved to a federal building in Scranton. Treadway notes that any contract awarded to a bidder within the restricted area will expire on April 30, 1987 or, if the 1-year option is exercised, on April 30, 1988. Therefore, Treadway argues, bidders with facilities within the Scranton area (which includes Treadway) should be permitted to participate in the competition since, for a minimum of one half of the 1-year base period, the MEPS will be located in Scranton.

The Army states that the MEPS in Wilkes-Barre in fact will not be moved until fiscal year 1988, at the earliest. This statement is supported by a letter from the General Services Administration advising the contracting officer that if any such move takes place, it will be no earlier than March 1988. Furthermore, the agency states that before exercising the option to extend the contract, it will verify the status of the proposed move. Thus, Treadway's new information appears to have no basis in fact, and provides no valid reason for reconsidering our prior decision.

After Treadway filed its request for reconsideration with our Office, bids in response to the IFB were received and opened as scheduled. Three facilities submitted bids, including Treadway and two facilities within the geographically restricted area. One of the latter was found nonresponsive because it bid on the option year only. Treadway submitted the low bid.

Treadway now argues that since the agency actually received only one responsive bid from a bidder within the restricted area, adequate competition within the area in fact was not available, and the Army was not justified in imposing the geographic restriction. The reasonableness of a contracting officer's decision must be determined on the basis of the information available when the decision was made. See *Freund Precision, Inc.,* B-207426, Dec. 7, 1982, 82-2 CPD ¶ 509. Our initial decision found that the agency reasonably believed that adequate competition would be obtained, and the fact that only one responsive bid was received does not signify that the belief was unreasonable at the time.

In addition, Treadway argues that as only one responsive bid was received, this procurement amounts to a sole source acquisition which required that the Army comply with the procedures set out in the Federal Acquisition Regulation (FAR) for such procurements. We disagree. This is not a case where the Army determined that only one source could meet its minimum needs; rather it is a case where the Army determined that those needs potentially could be met by any one of the nine facilities it knew were located within five miles of the MEPS, and solicited all nine of those facilities. *See* FAR, 48 C.F.R. § 6.003 (1985).

Furthermore, we have found that a competitive IFB is not converted into a sole source procurement when only one bid is received if it can be demonstrated that firms other than the sole responsive bidder could have met the requirements. *Champion Road Machinery International Corp. et al.,* B-211587 *et al.,* Dec. 13, 1983, 83-2 CPD ¶ 674. The record indicates that the one responsive bidder within the restricted area was not the only facility in the area that could have met the agency's requirements. In fact, the agency states that it received another bid from a facility within the restricted area, although the bid is non-responsive because it provided prices for the option period only. In addition, two other bidders within the area expressed an interest in bidding on future lodging requirements. Accordingly, we think it is apparent that more than one facility can meet the agency's requirements here, and therefore that the solicitation in actuality was not a sole source procurement. *Id.*

We affirm our prior decision.

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